(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Phoenix Construction Services, Inc.	)	CWA Appeal No. 02-07
Docket No. CWA-04-2000-1504	)	

[Decided April 15, 2004]

FINAL DECISION AND ORDER

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

PHOENIX CONSTRUCTION SERVICES, INC.

CWA Appeal No. 02-07

FINAL DECISION AND ORDER

Decided April 14, 2004

Syllabus

Phoenix Construction Services Incorporated ("Phoenix") appeals an Initial Decision assessing a penalty of $23,000 against it for violations of the Clean Water Act ("CWA" or "Act"). Phoenix, a Florida corporation that specializes in commercial and specialty construction, worked as a contractor for Panama City Beach (the "City"), Florida, on the Frank Brown Park Project. In the course of this work, Phoenix filled 3.5 acres of jurisdictional wetlands while the City's application was pending for a permit which would authorize the filling of the wetlands pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

U.S. Environmental Protection Agency ("EPA") Region IV (the "Region") issued an administrative complaint alleging that Phoenix had violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material into wetlands without a section 404 permit. The Region sought an administrative penalty of $27,500, the maximum allowed under section 309(g)(2)(A) of the Act.

On January 29, 2001, Regional Judicial Officer Susan B. Schub ("Presiding Officer") issued an Accelerated Decision on Liability finding Phoenix liable for discharging a pollutant – fill materials – into a wetland that is part of the waters of the United States without the requisite CWA section 404 permit, as well as finding that these filling activities impacted an adjacent wetland area. She determined that the illegal activities were conducted over a minimum of five days. She also found that Phoenix was aware that a section 404 permit had not yet been issued, although Phoenix may have expected that a permit was to be issued in the near future. Following an evidentiary hearing to determine the appropriate penalty, the Presiding Officer issued the Initial Decision.

On appeal to the Environmental Appeals Board ("Board"), Phoenix contends that the Presiding Officer, in determining the penalty amount in the Initial Decision, made findings of fact that were contrary to the evidence and misapplied the CWA's penalty criteria. In particular, Phoenix's arguments are: (1) that the Presiding Officer incorrectly found that Phoenix's failure to wait for the issuance of a section 404 permit prior to filling the wetlands caused harm to the regulatory program and resulted in a risk or potential risk of environmental harm; (2) that the Region failed to prove that Phoenix's

activities caused actual harm to the adjacent wetlands; (3) that the Presiding Officer erred in considering the quality of the wetlands in her penalty assessment; (4) that the Presiding Officer erred in her calculation of the number of days of violation; (5) that the Presiding Officer erred in failing to reduce the penalty based upon certain "mitigating factors," including Phoenix's alleged post-complaint activities; (6) that the Presiding Officer erred in enhancing the penalty based upon Phoenix's culpability when she considered prior CWA incidents that she had previously found to be insufficient to establish Phoenix's prior history of violations; and (7) that the Presiding Officer erred in failing to adjust or predicate the penalty based upon penalties assessed in other CWA section 404 cases.

Following receipt of Phoenix's appeal, the Region filed a cross-appeal in which it claims that the Presiding Officer erred in her Initial Decision by failing to increase the penalty to reflect the alleged economic benefit Phoenix received in the form of costs associated with equipment (e.g., bulldozers) lying idly at the site.

Held: The Board affirms the Presiding Officer's $23,000 penalty assessment. Specifically, the Board concludes the following:

(1) The Presiding Officer did not err in finding that there was harm to the regulatory program based upon Phoenix's failure to obtain a section 404 permit prior to filling the wetlands. She also did not err in finding that the harm to the regulatory program resulted in a potential risk of environmental harm.

(2) The Presiding Officer did not err in finding that the Region proved, by a preponderance of the evidence, that Phoenix's activities caused actual harm to the adjacent wetlands, at least temporarily.

(3) The Presiding Officer did not err in considering the quality of the adversely impacted wetlands that adjoined the 3.5 acre site for which a permit application had been pending at the time of the filling. Furthermore, although it is not clear whether or not the Presiding Officer actually considered, in her penalty calculation, the quality of the 3.5 acres of wetlands for which a permit application had been submitted, whatever weight she may have given the quality of those 3.5 acres was tempered by her consideration of the fact that the filling of those acres was ultimately authorized by a permit. Thus, her mention of the quality of the wetland area that was later authorized to be filled does not constitute clear error or an abuse of discretion.

(4) Relying on the testimony of several witnesses, the Presiding Officer found that Phoenix's activities in violation of the CWA occurred, at a minimum, for five days. The Board finds no clear error or abuse of discretion in her analysis on this point.

(5) The Presiding Officer clearly considered the majority of Phoenix's alleged "mitigating factors" in the Initial Decision. She found three of them – the fact that the City was the permittee, the fact that the permit was pending and approval allegedly imminent, and the claim that Phoenix believed that oral approval was sufficient – to be insufficiently mitigating to warrant a penalty decrease. With respect to Phoenix's claim

that it believed the permit to have been already approved, the Presiding Officer found that the testimony flatly contradicted this claim. The Presiding Officer also considered the fact that an after-the-fact permit was issued in her gravity assessment, but apparently did not substantially reduce the gravity assessment based on this fact. The Board finds no clear error or abuse of discretion in the Presiding Officer's analyses of these "mitigating" circumstances. Finally, the Board concludes that Phoenix's post-complaint activities are insufficient to justify a penalty reduction. Thus, the Presiding Officer did not err or abuse her discretion in not discussing these post-complaint activities in greater detail in her consideration of the "justice factor" in her penalty analysis, nor did she err in failing to reduce the penalty based upon them.

(6) Phoenix's culpability supports an increase in the amount of penalty without regard to any prior incidents. Thus, the Board finds it unnecessary to address Phoenix's arguments with respect to the Presiding Officer's consideration of prior incidents in her culpability analysis.

(7) Penalty assessments in cases such as these are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another. Thus, the Presiding Officer did not err in not predicating or adjusting the penalty based on penalties assessed in other section 404 cases.

(8) The Board finds no clear error or abuse of discretion in the Presiding Officer's conclusion that the Region failed to meet its burden of proof on the issue of economic benefit. Thus, she did not err in failing to increase the penalty to incorporate Phoenix's alleged economic benefit in the form of costs associated with construction equipment potentially lying idly at the site.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. *STATEMENT OF THE CASE*

Phoenix Construction Services Incorporated ("Phoenix" or "Respondent") appeals to the Environmental Appeals Board ("Board") an Initial Decision by Regional Judicial Officer Susan B. Schub ("Presiding Officer") imposing a civil penalty of $23,000 upon Phoenix for violating section 301(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a). Specifically, the Presiding Officer found Phoenix liable for discharging a pollutant – fill materials – into a wetland that is part of the waters of the United States without the requisite CWA section

404 permit. Initial Decision ("Init. Dec.") at 1. While apparently not contesting the Presiding Officer's liability determination,[1] Phoenix contends that the Presiding Officer, in determining the penalty amount, made findings of fact that were contrary to the evidence and misapplied the CWA's penalty criteria. The U.S. Environmental Protection Agency ("EPA") Region IV (the "Region") has filed a cross-appeal, claiming that the Presiding Officer erred by failing to increase the penalty to reflect the alleged economic benefit Phoenix received.

We begin our examination by reviewing the applicable legal principles, as well as the factual and procedural history of the case. We then examine the Presiding Officer's penalty determination and the issues the two parties raise with respect to that determination. For the reasons stated below, the Board affirms the Presiding Officer's assessment of a $23,000 penalty for Phoenix's violation of CWA section 301(a).

II. *STATEMENT OF ISSUES*

The significant issues the Board must decide in this case are:

(1) whether the Presiding Officer correctly found that there was a risk or potential risk of environmental harm based upon Phoenix's failure to obtain a section 404 permit prior to filling the wetlands;

(2) whether the Region proved by a preponderance of the evidence that Phoenix's activities caused actual harm to the adjacent wetlands;

(3) whether the Presiding Officer erred in considering the quality of the wetlands in her penalty assessment;

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[1] *See infra* note 33 and accompanying text.

(4) whether the Presiding Officer erred in her calculation of the number of days of violation;

(5) whether the Presiding Officer erred in failing to reduce the penalty based upon certain "mitigating factors," including Phoenix's alleged post-complaint activities;

(6) whether the Presiding Officer erred in enhancing the penalty based upon Phoenix's culpability when she considered prior CWA incidents that she had previously found to be insufficient to establish Phoenix's prior history of violations;

(7) whether the Presiding Officer erred in failing to predicate or adjust the penalty in this matter based on penalties assessed in other CWA section 404 cases; and

(8) whether the Presiding Officer erred in failing to increase the penalty to incorporate Phoenix's alleged economic benefit, in the form of costs associated with the equipment (e.g., bulldozers) lying idly at the site.

III. *PRINCIPLES OF LAW*

The CWA makes it unlawful for any person to "discharge"[2] from any point source[3] into the waters of the United States any "pollutant,"[4] including dredged or fill material,[5] except in compliance with certain enumerated sections of the Act, one of which is section 404.[6] 33 U.S.C.

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[2] Section 301(a) specifically provides that "[e]xcept as in compliance with this section and section[] * * * 1344 [section 404], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The term "discharge," when used in the Act without qualification, includes "a discharge of a pollutant, and a discharge of pollutants." *Id*. § 1362(16). The statute defines the term "discharge of a pollutant," in relevant part, as "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). The CWA defines "navigable waters" to be "the waters of the United States, including the territorial seas." *Id*. § 1362(7).

[3] Section 502 of the Act defines "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

[4] The Act broadly defines the term "pollutant" to include "dredged spoil, solid waste, * * * rock, sand, [and] cellar dirt * * * discharged into water." *Id*. § 1362(6).

[5] As mentioned *supra* note 4, "pollutant" has an expansive definition, and has been interpreted to include dredged and fill material. *See United States v. Pozgai*, 999 F.2d 719, 725 (3d Cir. 1993) (applying definition to fill materials), *cert. denied*, 510 U.S. 1110 (1994); *United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir. 1985) (applying to dredged material), *cert. denied*, 474 U.S. 817 (1985); *United States v. Banks*, 873 F. Supp. 650, 656 (S.D. Fla. 1995) (applying to fill material and dredged soil), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999). In addition, section 404 of the CWA authorizes the U.S. Army Corps of Engineers ("Corps") to issue permits "for the discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. § 1344. The Corps' regulations define both "fill material" and "dredged material," as well as the "discharge" of each of the substances. *See* 33 C.F.R. § 323.2(c)-(f).

[6] Section 402 of the CWA is among those other "enumerated sections of the Act" that allow for discharges into the waters of the United States. *See* 33 U.S.C. § 1311(a). Section 402 sets up another critical permitting provision of the CWA, the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the EPA to issue permits for the discharge of pollutants in accordance with certain conditions. *Id.*

(continued...)

§§ 1311(a), 1344(a), 1362(6), (7), (12), (16); 33 C.F.R. § 323.2(a), (c)-(f); *accord Tull v. United States*, 481 U.S. 412, 414 (1987); *In re Britton Constr. Co.*, 8 E.A.D. 261, 264 (EAB 1999). Section 404 of the Act, which the U.S. Army Corps of Engineers ("Corps") and EPA jointly administer, authorizes the Corps to issue permits for the discharge of dredged or fill material into the waters of the United States. 33 U.S.C. § 1344(a). The Corps may prescribe conditions and/or limitations in these 404 permits, and typically does. *See* 33 C.F.R. §§ 320.4(r)(1), 325.2(a)(6); *see also* 33 U.S.C. § 1344(s) (authorizing the Corps to issue compliance orders or bring a civil action when it finds that a person has violated any condition or limitation in the permit); *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir. 1985) (stating that the CWA authorizes the Corps to "issue such permits under certain conditions and procedures"), *cert. denied*, 474 U.S. 817 (1985). The term "waters of the United States" is interpreted broadly,[7] and includes the wetlands adjacent to such waters. 33 C.F.R. § 328.3(a); *accord Tull*, 481 U.S. at 1833; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985). Thus, in order to legally discharge fill or dredged material into wetlands that are waters of the United States, a person must obtain a permit from the Corps authorizing such discharge into the wetland and must adhere to any condition or limitation contained in such permit.

Section 309 of the CWA contains several remedies, including administrative penalties, that are available for violations of the Act. 33 U.S.C. § 1319. Pursuant to section 309(g), EPA may assess civil administrative penalties whenever the Agency "finds that any person has violated section [301] * * * of this title." *Id*. § 1319(g)(1). This statutory provision establishes two categories of penalties. *Id*. § 1319(g)(2). Class I penalties "may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph

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[6](...continued)
§ 1342(a).

[7] Although the CWA does not define "waters of the United States," the associated regulations contain an extensive definition. *See* 33 C.F.R. § 328.3(a)(1)-(8); 40 C.F.R. § 122.2.

shall not exceed $25,000."[8] *Id*. § 1319(g)(2)(A). Class II penalties, on the other hand, "may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000."[9] *Id*. § 1319(g)(2)(B).

IV. *PRIOR HISTORY OF THE CASE*

A. *Factual Background*

Phoenix is a Florida corporation[10] that specializes in commercial and specialty construction, handling projects such as water treatment plants, pipe installation, and airport construction. Hearing Transcript ("Tr.") at 251-52. In its nineteen years of operations, Phoenix has worked on over one hundred construction projects in the Panama City

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[8] Congress subsequently enacted the Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701, which directs EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996). Pursuant to the regulations implementing the DCIA, for violations occurring after January 31, 1997, the maximum amount allowed per violation for a class I penalty under section 309(g)(2)(A) of the CWA has increased to $11,000, and the maximum overall amount has increased to $27,500. 40 C.F.R. § 19.4 (2002). Recently, the Agency has further increased the maximum penalty amounts for various environmental laws it administers. *See* Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004) (increasing the maximum overall amount for a class I CWA penalty to $32,500, but keeping the per violation maximum at $11,000). These latest inflation adjustments apply to violations occurring after March 15, 2004, and, as such, are inapplicable here.

[9] Pursuant to the regulations implementing the DCIA, *see supra* note 8, for violations occurring after January 31, 1997, the maximum amount allowed per violation for a class II penalty under section 309(g)(2)(B) of the CWA has increased to $11,000, and the maximum overall amount has increased to $137,500. 40 C.F.R. § 19.4 (2002). The recent 2004 inflation adjustment rule, *see supra* note 8, increases the maximum overall amount for a class II CWA penalty to $157,500, but maintains the maximum per violation amount at $11,000.

[10] Phoenix is therefore a "person" as defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5). *See also* Answer to Administrative Complaint ("Answer") at 1 (admitting that Phoenix is a person within the meaning of the CWA).

Beach-Bay County area of Florida.[11] *Id*. at 253. In 2001, Phoenix performed approximately $45 million in construction projects primarily located in Florida, $15 million of which were on projects in the Bay County area. *Id*. A number of these projects were located in and around water. *Id*. at 253, 479-80. James Finch is the chief executive officer and sole owner of Phoenix. *Id*. at 251.

In February of 1999, Phoenix entered into a contract with the City of Panama City Beach (the "City") to build, among other things, several softball and soccer fields at Frank Brown Park. *Id*. at 182-83, 253-54; *see also* Complainant's Exhibit ("CX") 16 (the contract between Phoenix and the City). Because the Corps had previously delineated part of the planned construction area[12] as jurisdictional wetlands under the CWA, *see* Tr. at 107, 184; CX 3 (site map identifying Corps jurisdictional wetland areas), a permit was required from both the Corps, *see* 33 U.S.C. § 1344(a), and the Florida Department of Environmental Protection ("DEP"),[13] *see* Fla. Stat. chs. 373, 403; Fla. Admin. Code Ann. r. 62-312.060, prior to filling the wetland portion of the park. *See* Tr. at 186. For this particular project, the City was the party responsible for obtaining the appropriate state and federal permits. *Id*.

Throughout late Winter and Spring of 1999, the City worked with both DEP and the Corps to obtain the necessary permits. CX 9, 10; Tr. at 110-13. During this process, issues arose delaying the issuance of both permits.[14] *See* Tr. at 74-6, 112. Although not involved in actually

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[11] The wetlands at issue in this litigation are located in Panama City Beach, Bay County, Florida.

[12] Significant portions of the land set aside for the soccer fields were classified as wetlands. CX 1 at 4, 8; Tr. at 193.

[13] Florida has an approved NPDES permit program. *See* 33 U.S.C. § 1342(b) (state permit programs).

[14] With respect to the state permit, the amount of land that the City was willing to provide in mitigation was the "sticking point." Tr. at 74-76. Regarding the federal (continued...)

obtaining the permits, Phoenix was kept apprised of the City's progress in obtaining the wetland permits in their regular weekly or bi-weekly meetings with the City. *Id*. at 186-87, 471.

During a progress meeting in late April or early May, the City engineer, Al Shortt, told Phoenix that "off the record we have an agreement" regarding the permit.[15] *Id*. at 205, 472. Shortly thereafter, Mr. Finch advised his employees at Phoenix to go ahead with the construction of the soccer field. *Id*. at 259. According to Edmund Schoppe, a project manager for Phoenix, filling the wetland area at Frank Brown Park would have been a two- to three-day project. *Id*. at 473. To the best of his recollection, he believed that the filling began on Saturday (May 1, 1999), continued on the following Monday, and concluded on Tuesday (May 4, 1999). *Id*. at 506.

On May 4, 1999, Jason Steele, an environmental specialist with DEP, visited Frank Brown Park in order to conduct a biological appraisal for the permit evaluation. *Id*. at 45. Upon his arrival, he discovered that the site appeared to have been filled and also noticed that no erosion controls were in place. *Id.* at 45-46. After one of Phoenix's employees, who was operating a bulldozer on site, directed him to the person in charge of the construction, Mr. Steele informed the employee-in-charge that a permit had not yet been issued for the Frank Brown Park site, and instructed him to cease and desist until the matter was resolved. *Id.* at 46. Mr. Steele returned to the site later that day with Mr. Shortt, the City

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[14](...continued)
permit, as of late April of 1999, the Corps still considered the application incomplete. *Id*. at 112. Mr. James Gilmore, a former environmental specialist with the Corps who had worked on the permit at issue in this case, explained that, once the Corps deemed the application complete, the permitting process, including the public notice period, would likely have taken at least two additional months and up to as much as a year. *Id.* at 113-16.

[15] Although the City engineer was presumably referring solely to the state permit, as that was the only permit that was likely to be issued in the near future, some testimony in the record indicated that the engineer did not state with specificity to which permit he had been referring and that Phoenix incorrectly believed that he had been referring to all necessary permits. Tr. at 205, 472-73, 476-77.

engineer. *Id.* at 46. Mr. Steele and Mr. Shortt advised Phoenix that it would be in its best interests if it erected erosion control devices at the site. *Id.* at 46. Mr. Steele thereafter issued a warning letter for the violation to both the City and Phoenix, which Phoenix received on May 7, 1999. *Id*. at 49-51; *see also* CX 5.

After DEP informed him that the Frank Brown Park site had been filled, James Gilmore, the Corps' environmental protection specialist who had been working on the federal permit for that site, visited the park on May 6, 1999. Tr. at 116. He surveyed the site and determined that the entire area for which a permit application was pending had already been filled. *Id.* at 117. He also observed a bulldozer leveling off dirt throughout the site. *Id*. at 117. In response to this activity, Mr. Gilmore drafted a cease and desist order to both the City and Phoenix, which the Corps issued on May 11, 1999. *Id*. at 118, 134; *see also* CX 7.

In a follow-up visit on May 10, 1999, Mr. Steele again returned to the site, where he observed a bulldozer moving dirt within the wetland area, apparently leveling and/or grading the site. Tr. at 51-52, 54. He noticed that, although some erosion controls had been erected, they did not enclose the entire site and they were inappropriately placed and installed. *Id*. at 55-56. Mr. Steele thereafter prepared a second warning letter that the Corps sent to both the City and Phoenix on May 11, 1999. *Id*. at 58; *see also* CX 11.

On July 2, 1999, Jose Negron,[16] a lab scientist with EPA, inspected the Frank Brown Park site. Tr. at 212. He observed that the site was entirely filled and that the erosion control devices "were in great disrepair [and] they were not functioning effectively." *Id.* at 213. Because of the poor erosion control at the edge of the permitted areas, eroding soil was effectively smothering the vegetation in the adjacent wetland areas and destroying the function of those wetlands. *Id*. at 213-14, 216. Mr. Negron testified that these affected wetlands were of

[16] We note that the Hearing Transcript lists Mr. Negron's first name as Jason. However, when he was sworn in, Mr. Negron stated that his first name is Jose. This latter name was also used in other locations throughout the record. Accordingly, we assume that Jason was a typographical error and have used Jose.

medium to high quality. *Id*. at 220. According to Mr. Negron, had this project been performed under a section 404 permit, the poorly functioning erosion control devices would not have complied with the best management practices that are a condition of all wetland fill permits. *Id*. at 215.

The DEP eventually issued an after-the-fact permit for the Frank Brown Park site on September 2, 1999.[17] *Id*. at 249; CX 8. On October 20, 1999, Victor Keisker, a biologist with DEP, conducted a follow-up compliance inspection of the site. Tr. at 232-33. He found the site to be significantly out of compliance. *Id*. at 233, 238-40. A few days after this inspection, Phoenix rectified all remaining problems. *Id*. at 240.

B. *Procedural History*

On December 8, 1999, Region IV issued an administrative complaint alleging that Phoenix had violated section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material into certain wetlands in Bay County, Florida without a section 404 permit.[18] Administrative Complaint ("Compl.") ¶¶ 2, 4. The Region sought an administrative penalty of $27,500, the maximum amount allowed under section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A).[19] Compl. ¶ 12. As required by the CWA, EPA gave public notice of the proposed assessment of an administrative penalty. CWA § 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A). Phoenix filed an answer to the administrative complaint on January 6, 2000. *See* Answer; Notice and Order of Feb. 11,

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[17] It is not clear from the record whether the Corps ever issued an after-the-fact permit.

[18] The enforcement authority for section 404-related violations is divided between EPA and the Corps. The Corps has the authority to assess penalties for violations "of any condition or limitation set forth in a permit." 33 U.S.C. § 1344(s)(1), (3); *accord id.* § 1319(g). EPA, on the other hand, has the authority to assess penalties for unpermitted discharges of dredged and fill material. *See id*. § 1311(a), 1319(g). Because Phoenix's premature filling of a wetland was an unpermitted discharge, EPA, through its regional office, handled the enforcement of the case.

[19] *See supra* note 8 and accompanying text.

2000 at 1. EPA received three comments from members of the public in response to the public notice.[20]

On April 17, 2000, the Region moved for an accelerated decision with respect to both liability and penalty.[21] Phoenix filed a Response to the Motion for Accelerated Decision on or about June 21, 2000, which was untimely under the Consolidated Rules of Practice Governing the Administrative Assessment of Penalties, Issuance of Compliance and Corrective Orders, and the Revocation, Termination, or Suspension of Permits ("CROP"), 40 C.F.R. part 22.[22] The Region thereafter filed a reply brief, requesting that the Presiding Officer decline to consider Phoenix's response.[23] Reply in Supp. of Mot. for Accel. Dec. at 1-2. The Region, however, also addressed Phoenix's arguments in its reply. *See id*. at 2-9.

On January 29, 2001, the Presiding Officer issued an Accelerated Decision on Liability. In it, she first held that it was appropriate in this case to consider Phoenix's late response in the interests of justice and in

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[20] Two of the commenters requested that EPA assess the maximum fine against Phoenix; the other commenter appears to suggest that the proposed penalty was not high enough to prove a deterrent. See Letter from Candis M. Harbison to Patricia Bullock, Regional Hearing Clerk (Jan. 4, 2000); Letter from Donald R. Taylor to Patricia Bullock, Regional Hearing Clerk (Jan. 5, 2000); Letter from James M. Barkuloo to Patricia Bullock, Regional Hearing Clerk (Jan. 6, 2000). In accordance with the Act, *see* CWA § 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B), the Presiding Officer invited the commenters to attend the hearing to allow them an opportunity to be heard. None of them, however, testified at the hearing.

[21] In its motion, the Region requested that the Presiding Officer find: (1) that the violation occurred as set forth in the administrative complaint; (2) that no genuine issue of material fact exists; (3) that the Region was entitled to judgment as a matter of law; and (4) that the maximum Class I civil penalty was appropriate. Mot. for Accel. Dec. at 1.

[22] According to the CROP, "[a] party's response to any written motion must be within 15 days after service of such motion." 40 C.F.R. § 22.16(b).

[23] The Region argued that not only was Phoenix's response untimely, but also that they had never filed a request for a continuance or extension of time.

light of the fact that the Region was not prejudiced by the late filing of the response. Accelerated Decision on Liability ("Accel. Dec.") at 3. With respect to the substantive issues raised in the Region's motion, the Presiding Officer found that there were no genuine issues of material fact as to liability[24] and held that Phoenix's discharges of fill material[25] into those wetlands[26] violated section 301(a) of the CWA. *Id*. at 11. The Presiding Officer also found that genuine issues of material fact existed regarding the appropriate remedy in the case and, therefore, she ordered a hearing scheduled. Neither party has appealed the findings and conclusions in the Accelerated Decision on Liability.

On January 16 and 17, 2002, the Presiding Officer conducted a hearing in Panama City, Florida to determine the appropriate penalty to be assessed against Phoenix in this matter. After receiving post-hearing briefs and reply briefs from both parties, the Presiding Officer issued an

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[24] Phoenix, in its response brief, had argued that the Region did not sufficiently prove certain elements of liability. The Presiding Officer, however, held that some of these elements were clearly established as a matter of law, for example, whether the fill deposited at the site qualifies as a "pollutant" and whether the equipment Phoenix used were "point sources." Accel. Dec. at 8. In addition, the Presiding Officer found that certain of Respondent's arguments did not "rise to the level of a germane issue of fact in dispute," such as whether the site in question was a jurisdictional wetland. *Id*. at 8-10. Finally, the Presiding Officer determined that certain of Phoenix's arguments bore on the amount of the penalty rather than the fact of liability, for example, the fact that an after-the-fact permit was eventually issued (at least by the DEP). *Id*. at 10. None of these findings were appealed.

[25] The Presiding Officer found Phoenix discharged "over 28,000 cubic yards of fill" dirt into the wetland using a bulldozer, an excavator, and two loaders. *See* Accel. Dec. at 8. She held the fill dirt constituted a "pollutant" under the CWA, and the bulldozer, excavator, and two loaders were "point sources." *Id.* Phoenix does not contest the Presiding Officer's findings on these liability issues in its appeal.

[26] The Presiding Officer found that the wetlands in question were adjacent to West Bay, and therefore fell within the definition of "waters of the United States" as defined in 33 C.F.R. § 328.3(a)(7). Accel. Dec. at 9. Again, Phoenix did not appeal this determination.

Initial Decision, assessing a penalty of $23,000. Phoenix timely appealed the decision to the Board, and, thereafter, the Region cross-appealed.[27]

On appeal, Phoenix challenges the Presiding Officer's penalty assessment on several grounds. According to Phoenix, the Presiding Officer "made findings of fact which are contrary to the evidence, and misapplied the statutory penalty criteria." Respondent's Notice of Appeal and Brief ("Resp't Appeal Br.") at 1. Phoenix specifically lists ten issues that it presents for review.[28] *Id*. at 2-3. In its cross-appeal, the Region argues that, while the Presiding Officer generally applied the statutory criteria correctly, she erred in failing to increase the penalty to reflect the alleged economic benefit received by Phoenix. Notice of Cross-Appeal, Brief in Support of Cross Appeal, and Response Brief of Complainant ("Reg. Cross-Appeal Br.") at 1. The Region also contends that one of the Presiding Officer's reasons for not increasing the penalty based on economic benefit – that the "gravity-based penalties are already substantially in excess of the economic benefit" – was erroneous as a matter of law. *Id*. at 35 (quoting Init. Dec. at 15).

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[27] Under the CROP, a party may appeal an initial decision within 30 days of its service or, if a timely notice of appeal is filed by another party, a party may file its own notice of appeal (i.e., file a "cross-appeal") within 20 days of service of the first notice of appeal. 40 C.F.R. § 22.30(a)(1).

[28] For a more detailed discussion of Phoenix's issues on appeal, see *infra* section V.C.

V. *ANALYSIS*

A. *Standard of Review*

In part 22 enforcement appeals, the Board generally reviews the presiding officer's factual and legal conclusions on a *de novo* basis.[29] *See* 40 C.F.R. § 22.30(f) (providing that the Board is authorized to "adopt, modify, or set aside the findings of fact and conclusions of law" contained in the initial decision); *accord In re City of Marshall*, CWA Appeal No. 00-09, slip op. at 10 (EAB, Oct. 31, 2001), 10 E.A.D. ___; *In re LVI Envtl. Servs.*, CAA Appeal No. 00-08, slip op. at 3 (EAB, June 26, 2001), 10 E.A.D. ___. The Board, however, will ordinarily defer to a presiding officer's factual findings where credibility of witnesses is at issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *accord City of Marshall,* slip op. at 10; *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992). Although the regulations grant the Board *de novo* review of a penalty determination, the Board generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing a penalty. *See, e.g., In re Advanced Elecs., Inc.*, CWA Appeal No. 00-05, slip op. at 20 (EAB, Mar. 11, 2002), 10 E.A.D. ___, *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003); *In re Slinger Drainage, Inc*., 8 E.A.D. 644, 669 (EAB 1999), *appeal dismissed for lack of juris.*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001); *In re Britton Constr. Co.*, 8 E.A.D. 261, 293 (EAB 1999).

We begin by briefly reviewing the Presiding Officer's penalty assessment. We will then evaluate Phoenix's arguments regarding that assessment, addressing each of Phoenix's points in turn. Finally, we conclude by examining the Region's argument regarding the Presiding

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[29] Under the CROP, matters in controversy must be established by a "preponderance of the evidence." 40 C.F.R. § 22.24(b); *accord In re Britton Constr. Co.,* 8 E.A.D. 261, 274 (EAB 1999).

Officer's failure to include an economic benefit component in the penalty assessment.

B. *Initial Decision*

In assessing a civil penalty of $23,000 against Phoenix in the Initial Decision, the Presiding Officer considered, in detail, each of the administrative penalty factors listed in section 309(g) of the CWA, 33 U.S.C. § 1319(g)(3).[30] She found that the nature, circumstances, extent, and gravity of the violation was significant and assessed a $20,000 base penalty. Init. Dec. at 7, 19. The Presiding Officer based her determination on a number of factors, including the fact that 3.5 acres had been illegally filled. *Id*. at 3 & n.1. She also found that Phoenix's filling activities adversely impacted some of the neighboring wetlands, which were of medium quality. *Id*. at 18. She also concluded that Phoenix's filling activities occurred over a minimum period of five days, and that Phoenix continued working after DEP notified it to cease the filling activity. *Id*. In addition, the Presiding Officer found that Phoenix knew that the federal permit had not yet been issued (although issuance was allegedly expected soon), and that Respondent, as an experienced contractor that had conducted extensive activities near water was (or should have been) aware that filling wetlands without a 404 permit is illegal. *Id*. at 18-19. Finally, she concluded that, because Phoenix's activities "circumvented the review by the public and regulatory agencies that is essential to maintain the integrity of the process," harm to the regulatory program resulted from such activities. *Id*. at 19.

In analyzing two of the other statutory penalty factors – Phoenix's "prior history of such violations" and "culpability" – the Presiding Officer considered information about certain incidents involving Phoenix and/or Mr. Finch. *See id.* at 7-13, 19. She concluded there was insufficient evidence regarding these incidents to establish

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[30] Section 309(g) requires the Agency to consider "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3); *see also infra* section V.D.1.

Phoenix's prior history of violations as that term is meant by the CWA. *Id*. at 9. She also concluded, however, that, based on certain of the alleged incidents[31] as well Phoenix's knowledge and business experience,[32] Respondent did have sufficient culpability to warrant a $3,000 increase in the penalty.

With respect to the ability-to-pay statutory factor, the Presiding Officer found that it was not at issue in the case and thus she did not change the penalty based upon this factor. *Id*. at 7, 14. As for the economic benefit factor, the Presiding Officer held that the Region's evidence regarding this factor was insufficient. In rejecting the Region's arguments to increase the penalty based upon economic benefit, she also stated that a "gravity based penalty would be in excess of economic benefit so no assessment for that factor is warranted." *Id*. at 19.

Finally, the Presiding Officer also discussed whether to consider other factors. *Id*. at 15-17. She determined that she should consider the fact that an application for the necessary permits had been submitted and was pending and the fact that the City rather than Phoenix was the permittee. Ultimately, however, she held that, under the facts and circumstances of this particular case, these two factors did not sufficiently justify lowering the penalty, and she assessed a fine of $23,000.

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[31] The Presiding Officer pointed out that the alleged incidents, while not perhaps sufficient for the prior history factor, did demonstrate that both Phoenix and Mr. Finch, the President and sole shareholder of the company, had had previous dealings with both state regulators and the Corps regarding violations of environmental statutes, in particular the CWA. Init. Dec. at 9, 13.

[32] The Presiding Officer stated that Phoenix "completed $45 million in projects in 2001, many of which were conducted near water." Init. Dec. at 13 (citing Tr. at 253).

C. *Phoenix's Appeal: Amount of Penalty*

In its appeal, Phoenix apparently does not contest liability;[33] rather, Phoenix contends that the Presiding Officer erred in her penalty determination. Although Phoenix generally maintains that the Presiding Officer "made findings of fact which are contrary to the evidence, and misapplied the statutory penalty criteria of 33 U.S.C. § 1319(g)(3)," Resp't Appeal Br. at 1, many of Phoenix's specific arguments largely boil down to a disagreement with the Presiding Officer's factual findings. Phoenix lists five factual "findings" with which it disagrees: (1) that there was environmental harm; (2) that there was a potential risk of environmental harm; (3) that the quality of the filled wetlands were considered; (4) that there was a potential risk to the regulatory program; and (5) that the gravity of the violation was significant. Resp't Appeal Br. at 2-3 (Statement of the Issues Presented for Review ("Statement of the Issues") Nos. 1-3, 5-6). Phoenix also asserts that the Presiding Officer erred in finding that "Mr. Finch's personal dealings with regulatory agencies exacerbated Respondent's culpability." *Id.* (Statement of the Issues No. 7). This last issue will be dealt with separately from the others, in our consideration of the culpability statutory factor. *See infra* section V.D.3.

[33] Although Phoenix does not explicitly state that it does not contest liability, nowhere in its brief does it raise issues with respect to the Accelerated Decision or the Presiding Officer's liability determination therein. In fact, after describing the procedural history, which includes a brief discussion of the Accelerated Decision on Liability, the penalty hearing, and the Initial Decision (the latter of which is solely focused on the amount of the penalty), Phoenix states that "[i]t is from that Initial Decision the Respondent now appeals." Resp't Appeal Br. at 4. Phoenix also states that "[i]n determining the amount of the *penalty*, the presiding officer made findings of fact which are contrary to the evidence, and misapplied the statutory [penalty] criteria." *Id*. at 1 (emphasis added). In fact, Phoenix suggests a penalty (at a much lower amount), which is inconsistent with claiming that it is not liable. Accordingly, in this decision the Board will only review the Presiding Officer's penalty determination.

Phoenix also enumerates approximately[34] six "mitigating" factors that it believes the Presiding Officer did not adequately consider in calculating an appropriate penalty. Resp't Appeal Br. at 2-3. Specifically, Phoenix contends that the Presiding Officer failed to "find as significant mitigating factors" the following: (1) that the City, not Phoenix, was responsible for obtaining the required permits; (2) that these permits had been applied for and allegedly were about to be issued when the site was filled; (3) that Phoenix was "led to believe that an agreement between the permitting agency and the City" had been reached and that the permit application had, in fact, been approved; (4) that Phoenix was not familiar with whether "a regulator can give verbal permission to proceed before the actual permit document is delivered;" (5) that a permit was ultimately issued after the fact; and (6) that there was no environmental harm to the surrounding wetlands. *Id*. (Statement of the Issues Nos. 4, 8(a)-(e)). Phoenix also claims that the Presiding Officer erred in failing to consider its post-complaint compliance. *Id*. at 3 (Statement of the Issues No. 9).

While Phoenix contends that the Presiding Officer "misapplied" the statutory penalty criteria, the majority of its arguments actually appear to focus on the Presiding Officer's alleged failure to appropriately consider the mitigating factors when she considered the statutory factors. Phoenix argues, in turn, that consideration of these mitigating factors would have resulted in a lower penalty.[35] *Id*. at 11-17. In arguing for a much lower penalty, Phoenix compares the penalty amount the Presiding

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[34] A few of Phoenix's arguments appear to be duplicative. For example, Phoenix alleges that the Presiding Officer "misapplied the significance of the fact that a permit for the work was pending and ultimately issued after the fact," Resp't Appeal Br. at 2 (Statement of the Issues No. 4), and that she "erred in failing to find as [a] significant mitigating factor[] * * * [t]he permits for the filling of the three acres had been applied for, and their issuance was imminent," *id*. (Statement of the Issues No. 8(b)). Because these two statements appear to essentially raise some of the same issues, we have merged these overlapping issues together in listing and considering Phoenix's arguments.

[35] Phoenix argues on appeal that a penalty of $500 would be appropriate in this case. Resp't Appeal Br. at 17. In its post-hearing brief, Phoenix argued that a $10 *de minimis* penalty per violation was appropriate. *See* Resp't Proposed Findings of Fact and Conclusions of Law at 5-6.

Officer assessed in this case with penalties assessed in other wetlands cases.

Finally, Phoenix specifically questions the Presiding Officer's interpretation of one of the statutory penalty criteria, the violator's culpability. *See id.* at 12-14. It argues that with respect to culpability, the term "violator" as used in 33 U.S.C. § 1319(g)(3), refers solely to Phoenix, and cannot include consideration of the actions of its chief executive officer and sole owner, Mr. Finch. *Id*. at 13-14. Phoenix additionally contends that since the Presiding Officer considered those actions insufficient to establish another of the statutory penalty factors, the violator's prior history, the Presiding Officer should likewise consider the actions insufficient to establish the culpability factor. *Id*. at 12-13. We will consider each of these arguments in turn.

D. *Analysis of Phoenix's Arguments*

1. *Statutory and Regulatory Considerations*

The CWA enumerates certain factors that the Agency must consider when assessing an administrative penalty pursuant to section 309(g):

> [T]he nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).[36] The Act does not, however, "prescribe a precise formula by which these factors must be computed" nor does it provide any guidance regarding the relative weight to be given to any of them. *In re Advanced Elecs., Inc.*, CWA Appeal No. 00-5, slip op. at 20 (EAB, Mar. 11, 2002), 10 E.A.D. ___ (citing *In re Pepperell Assocs*., 9 E.A.D. 83, 107 (EAB 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001)*), appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003). In fact, the Supreme Court has stated that trial judges have significant discretion in setting penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 427 (1987) (stating that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act").

In addition to these statutory factors, the CROP requires that a Presiding Officer consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). With respect to CWA section 404 matters, however, the Agency has not issued any litigation guidelines; the only section 404 guidelines in existence are settlement guidelines, whose application outside the settlement context generally is disfavored.[37] *In re Britton Constr. Co.*, 8 E.A.D. 261, 280 (EAB 1999) (citing U.S. EPA, *Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices* (Dec. 14, 1990) ("*404 Settlement*

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[36] When the Agency brings a civil action in federal district court under section 309(b), 33 U.S.C. § 1319(b), a similar, but not identical, set of penalty criteria applies. *See* 33 U.S.C. § 1319(d) (instructing the district court to "consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require").

[37] The Board has noted that, in general, settlement policies should only be used in the settlement context. *Britton*, 8 E.A.D. at 287. In certain limited circumstances, however, "when logic and common sense so indicate," relevant portions have been considered in the administrative litigation setting. *Id.* (considering general Agency principles articulated in the *404 Settlement Policy* with respect to economic benefit considerations); *see also In re B.J. Carney Indus.*, 7 E.A.D. 171, 209 & n.46 (EAB 1997) (using information derived from a settlement policy model to explain general principles of economic benefit calculations), *appeal dismissed as moot,* 200 F.3d 1222 (9th Cir. 2000).

Policy")). Additionally, the Agency has developed several general civil penalty guidelines, *see* EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties* (Feb. 16, 1984) ("*Policy on Civil Penalties*"); EPA General Enforcement Policy #GM-22, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* ("*Penalty Framework*") (Feb. 16, 1984), which are often considered when no statute-specific guidance is available. *In re City of Marshall*, CWA Appeal No. 00-09, slip op. at 22 (EAB, Oct. 31, 2001), 10 E.A.D.___; *In re Wallin*, CWA Appeal No. 00-03, slip op. at 10 n.9 (EAB, May 30, 2001), 10 E.A.D.___.

The Board has previously explained that, in circumstances such as these where the Agency has not developed a specific penalty policy, it is appropriate for the presiding officer, in calculating a penalty, to examine each of the statutory factors directly. *Advanced Elecs.*, slip op. at 20 (citing *Britton*, 8 E.A.D. at 278-79); *see also City of Marshall*, slip op. at 22 & n.29; *Wallin*, slip op. at 10 n.9. As we mentioned above in section V.A, in reviewing a penalty assessment, the Board generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion.

Nearly all the issues Phoenix raises on appeal generally fall within two of the CWA statutory criteria – "the nature, circumstances, extent, and gravity of the violation" and "the degree of culpability."[38] We thus will analyze each of these factors, and all the issues Phoenix raises in connection with them, in turn.

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[38] Although Phoenix does not identify which statutory criteria applies to one of its claims, its alleged post-complaint compliance, we conclude, as discussed below, that it most properly relates to the "justice factor." *See infra* section V.D.2.e.vi. However, because it is also one of Phoenix's six "mitigating factors," we discuss it with the other alleged mitigating factors under our discussion of the first statutory criterion. *See infra* section V.D.2.e.vi.

2. *The Nature, Circumstances, Extent, and Gravity of the Violation*

a. *Potential for Harm/Risk to Regulatory Program*

In her Initial Decision, the Presiding Officer assessed a substantial Class I penalty against Phoenix relying, in part, on her conclusion that there was both actual environmental harm,[39] and potential risk of environmental harm in the form of "harm to the regulatory program."[40] Init. Dec. at 6-7, 19 (stating that "Respondent's activity resulted in harm to the regulatory program in that it circumvented the review by the public and regulatory agencies that is essential to maintain the integrity of the process"); *accord id*. at 6-7 (considering whether there was "harm resulting or *potentially resulting* from defiance of a regulatory program"). She explained that "[i]t is the defiance of the regulatory process that could, if uncurtailed, lead to immeasurable environmental harm." *Id*. at 6-7. Phoenix disagrees with her conclusions that there was potential risk of environmental harm and that there was potential risk to the regulatory program. Resp't Appeal Br. at 2 (Statement of the Issues Presented for Review Nos. 2, 5).

In challenging the Presiding Officer's findings on this point, Phoenix argues that, because all parties anticipated that a permit would be granted to allow these wetlands to be filled, and "because Phoenix had been waiting for approximately two months for the City to get the permits so the wetlands could be filled," Phoenix's filling of the wetlands prior to the issuance of the permit was not in defiance of the regulatory

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[39] In particular, the Presiding Officer held that there was actual environmental harm to the land adjacent to the permitted area. *See infra* section V.D.2.b.

[40] In setting a base penalty amount, she also relied upon the quality of the adjacent wetlands that Phoenix's activities impacted, *see* discussion *infra* section V.D.2.c, the length of time of the violation, *see* discussion *infra* section V.D.2.d, as well as the other circumstances pertaining to the violation.

process.[41] *Id*. at 12. Phoenix further maintains that "[t]here was never a risk of environmental harm, but for the improper timing of the filling operation." *Id.* We disagree, both as a factual and as a legal matter.

The Board and its predecessors have held that, where a respondent has failed to obtain necessary permits or failed to provide required notice, such failure caused harm to the regulatory program. *See, e.g., In re Friedman*, CAA Appeal 02-07, slip op. at 60 (EAB, Feb. 18, 2004), 11 E.A.D. __ (holding that a failure to provide required notice of planned removal of threshold levels of regulated asbestos-containing material harms the Clean Air Act's regulatory scheme for asbestos under the Clean Air Act and can result in a significant penalty); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03, 605 (EAB 1996) (concluding that the failure to obtain a permit prior to disposing of hazardous waste created harm to the regulatory program under the Resource Conservation and Recovery Act ("RCRA")), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998)); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 418-19 (CJO 1987) (holding respondent's failure to file a notification under RCRA to have a substantial adverse impact on the regulatory program). Thus, for example, in holding that a respondent's failure to obtain a RCRA permit prior to disposing of hazardous wastes was of major significance, we have stated that "the RCRA permitting requirements 'go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function.'" *Everwood*, 6 E.A.D. at 602 (quoting *McDonald Indus.,* 2 E.A.D. at 418).

These Board determinations are consonant with the Agency's general penalty framework guidance, which lists "importance to the regulatory scheme" as one of the important factors to consider in

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[41] Phoenix also appears to raise questions about the Presiding Officer's characterization of the "filling of these wetlands as 'a needless and rather wanton destruction of wetlands vegetation'" in connection with its arguments about the risk of harm issue. *See* Resp't Appeal Br. at 12 (citing Init. Dec. at 7). The Presiding Officer, however, made this statement in reference to her finding of environmental harm in the land *adjoining* the permitted wetland. Accordingly, it will be addressed below in our discussion of the harm to the adjacent wetland areas. *See infra* section V.D.2.b.

quantifying the gravity of a violation.[42] *Penalty Framework* at 14. As the guidance explains, "[t]his factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling [sic] is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty." *Id*. at 14.

Furthermore, risk to a regulatory program by disregarding the monitoring, reporting, or permitting requirements of an environmental statute also often results in potential environmental harm. *See, e.g., In re Advanced Elecs., Inc.*, CWA Appeal No. 00-05, slip op. at 22-23 (EAB Mar. 11, 2002), 10 E.A.D. ___, *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003) (upholding the presiding officer's determination that respondent's failure to monitor as required under the CWA had essentially created a significant potential for harm) (quoting *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000)*; accord In re Woodcrest Mfg., Inc*., 7 E.A.D. 757, 781 (EAB 1998) (rejecting respondent's contention that failure to file the forms required by the Emergency Planning and Community Right-to-Know Act ("EPCRA") did not cause harm to the program), *aff'd,* 114 F. Supp. 2d 775 (N.D. Ind. 1999); *Everwood*, 6 E.A.D. at 602–04 (concluding that the failure to obtain a permit prior to disposing of hazardous waste created a substantial potential for harm under RCRA); *In re Port of Oakland*, 4 E.A.D. 170, 186-87 (EAB 1992) (finding that unpermitted ocean dumping in violation of the Marine Protection, Research, and Sanctuaries Act should be considered of major significance because of the risk of harm).

We have not previously considered the specific question of whether the failure to obtain a section 404 permit could cause harm to the

[42] The other factors to consider in the gravity portion of the penalty assessment are actual or possible harm, availability of data from other sources, and size of the violator. *Penalty Framework* at 14.

CWA regulatory scheme.[43] Similar to the principles enunciated in the RCRA context, the failure to obtain a permit goes to the heart of the statutory program under the CWA. The CWA's fundamental purpose is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Wetlands comprise an important part of the waters of the United States and thus clearly constitute a material part of the waters the CWA is intended to protect.[44] One of the most critical aspects of the CWA statutory scheme is the regulation of discharges of point sources into the waters of the United States through the issuance of permits, including permits for the

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[43] The Board has published four formal decisions addressing section 404 wetlands violations under the CWA: *In re Bricks, Inc.*, CWA Appeal No. 02-09 (EAB, Oct. 28, 2003), 11 E.A.D. __; *In re Veldhuis*, CWA Appeal No. 02-08 (EAB, Oct. 21, 2003), 11 E.A.D. __, *appeal voluntarily dismissed*, No. 0374235 (9th Cir. Mar. 8, 2004); *In re Britton*, 8 E.A.D. 261 (EAB 1999); and *In re Slinger Drainage, Inc*, 8 E.A.D. 644 (EAB 1999), *appeal dismissed for lack of juris.*, 237 F.3d 681 (D.C. Cir.), *cert. denied*, 534 U.S. 972 (2001). The *Bricks*, *Veldhuis*, and *Slinger* decisions were cases where liability was at issue and thus contained very little discussion regarding the assessed penalty. Although the *Britton* decision contained an extensive penalty analysis, the parties did not raise the question of harm to the regulatory program. Likewise, of the three decisions by EPA's Chief Judicial Officer with respect to wetlands violations under the CWA, *see In re Sasser*, 3 E.A.D. 703 (CJO 1991), *aff'd*, 990 F.2d 127, 129 (4th Cir. 1993); *In re Hoffman Group*, 3 E.A.D. 408 (CJO 1990), *vacated in part sub nom. Hoffman Homes, Inc. v. Adm'r, U.S. EPA*, 999 F.2d 256 (7th Cir. 1993); *In re Borden Inc., Colonial Sugars*, 1 E.A.D. 895 (CJO 1984), only two addressed the issue of the penalty assessment, *see Sasser*, 3 E.A.D. at 707-10; *Hoffman Group*, 3 E.A.D. at 436-37, and neither of them discussed the issue of harm to the regulatory program.

[44] "Congress has determined that 'the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage,' damage so egregious that wetlands merit protection by laws like the CWA which promotes the restoration and maintenance of wetland resources." *United States v. Larkin*, 657 F. Supp. 76 (W.D. Ky. 1987) (quoting Staff of Senate Comm. on the Environment, 95th Cong., 2d Sess., A Legislative History of the Clean Water Act of 1977, at 869-70 (Comm. Print 1978) (Statement of Sen. Muskie)), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989). Additionally, in the Emergency Wetlands Resources Act of 1986, Congress has stated that "wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation." 16 U.S.C. § 3901(a)(1).

discharge of dredged or fill material into wetlands. *See* discussion *supra* note 6 and accompanying text. As a number of federal courts have observed "[t]he permit process is 'the cornerstone of the * * * scheme for cleaning up the nation's waters.'" *United States v. Huebner*, 752 F.2d 1235, 1239 (7th Cir.) (quoting *U.S. Steel Corp. v. Train*, 556 F.2d 822, 829 (7th Cir. 1977)), *cert. denied*, 474 U.S. 817 (1985); *accord Kelly v. U.S. EPA*, 203 F.3d 519, 522 (7th Cir. 2000); *United States v. Pozgai*, 999 F.2d 719, 724-25 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994); *Greenfield Mills, Inc. v. O'Bannon*, 189 F. Supp. 2d. 893, 901 (N.D. Ind. 2002); *see also United States v. Banks*, 873 F. Supp. 650, 656 (S.D. Fla. 1995) (stating that section 301, in conjunction with permitting provisions such as section 404, is the cornerstone of the CWA), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999); *United States v. Lambert*, 915 F. Supp. 797, 801-02 (S.D. W. Va. 1997) (same).

Obtaining a section 404 permit is important for several reasons. First, filling a wetland without a permit may, in some cases, lead to irreparable harm to the filled wetland itself. This is especially true in circumstances where the Corps might not have permitted a discharge at all, for example, because the particular wetland was extremely important to a certain ecosystem. *See* 33 C.F.R. § 320.4 (b)(4) (providing that a permit may be denied for certain wetlands because of their importance to the public interest)*; see also United States v. Banks*, 873 F. Supp. 650, 654 (S.D. Fla. 1995) (stating that the Corps denied the after-the-fact permit because of the importance of the wetlands and the fact that there were alternative sites for the proposed activity), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999). Additionally, the Corps sometimes grants permits only for a portion of the requested wetland area. 33 C.F.R. § 320.4(r)(1)(i). Furthermore, in the section 404 context, the Corps generally issues permits containing conditions of use mandating certain management practices designed to prevent or reduce significant impacts to neighboring wetland areas.[45] Tr. at 215; *see also* 33 C.F.R. §§ 320.4(r)(1)(i), 325.2(a)(6). Thus, the obtaining of permits and the following of such conditions is *critical* to the basic purpose of the

[45] The erosion controls required by the after-the-fact permit issued by DEP in this case, *see* note 17 and accompanying text, exemplify such controls.

section 404 program as well as the CWA. *See, e.g., Kelly*, 203 F.3d at 522 ("The purpose of requiring federal approval beforehand is to prevent or minimize aquatic damage."). Moreover, as the Presiding Officer noted, the statute specifically provides for public participation in the section 404 permitting process. *See* 33 U.S.C. § 1344 ("[t]he Secretary may issue permits, *after notice and opportunity for public hearings* for the discharge of dredged or fill materials" into waters of the United States) (emphasis added); 33 C.F.R. § 325.2(a)(2) (requiring district engineer to issue a public notice once an application is complete). When a wetland is filled prior to the consideration of public comments, this statutory requirement is essentially rendered moot by the applicant's unilateral action.

Finally, there is yet another aspect of potential harm to the regulatory program that is of particular concern in the section 404 context. Even though in many cases only a small acreage is impacted, because private landowners' (or hired contractors') filling activities are typically visible to other members of the local community, the perception that an individual is "getting away with it" and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention. Other courts have remarked on this general phenomenon. *See United States v. Van Leuzen*, 816 F. Supp. 1171, 1179, 1180, 1182 (S.D. Tex. 1993) (finding that "the open, notorious, and willful violations at the Site have damaged the federal wetlands permit program in the area" and requiring defendant, at least in part to rectify the damage to the program, to erect a large billboard along the highway notifying passersby that he has been required to pay a fine and to remove, at his expense, the illegal fill that he had placed without a permit); *Kelly*, 203 F.3d at 523 (affirming EPA's position that deterrence was appropriate in the case where a hundred of defendant's neighbors had signed a petition saying they supported defendant's activities); *see also Buxton v. United States*, 961 F. Supp. 6, 10 (D.D.C. 1997) (finding that the "run-of-the-mill nature" of the draining and filling of the wetland and the relatively small acreage of impacted land does not lessen the seriousness of the actions as an "accumulation of similar CWA violations, taken as a whole, point to a serious environmental problem in

need of attention"). The Corps has also articulated the seriousness of a series of such related, "minor" violations: "Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources." 33 C.F.R. § 320.4(b)(3).

Accordingly, for all of the reasons discussed above, we hold that even if there is no actual harm to the environment, failure to obtain a 404 permit before filling jurisdictional wetlands may cause significant harm to the regulatory program.[46] Under the facts of this case, the Presiding Officer correctly found that there was significant potential for harm to the regulatory program.[47] Consequently, we find no error in her reasons for assessing such a penalty in this case based on risk of harm to the regulatory program and affirm her decision on this point.

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[46] Moreover, failure to halt filling activities after being informed by the regulatory agency to cease may also cause substantial harm to the program. *See United States v. Cumberland Farms, Inc.*, 647 F. Supp. 1166, 1185 (D. Mass. 1986) (specifically penalizing defendant for continuing to grade and fill the wetland after learning that the Corps had asserted jurisdiction over the site and, additionally, had issued a cease and desist order), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

[47] That Phoenix did not immediately fill the wetland without a permit but, instead, waited a certain period before illegally filling the wetland, does not persuade us there was no harm to the regulatory program. Further, even ignoring Phoenix's activities at the site after it was told to cease filling, the actions of Phoenix in failing to confirm that a permit had indeed been issued for the site and in failing to ascertain the conditions of such permit appear to constitute careless or reckless disregard for the regulatory process, and the environment that the regulatory process is designed to protect. *See Van Leuzen*, 816 F. Supp. at 1175 (finding the contractor to be "cavalier and irresponsible" and "deficient in his exercise of reasonable care" for failing to ascertain whether a permit had, in fact, been granted). For the same general reasons discussed above, careless disregard for the permitting process also leads to same type of harm to the regulatory program that outright defiance does. That Phoenix believed a permit was likely to be granted does not convince us otherwise. This kind of behavior can lead to the filling of wetlands that the Corps may decide are too environmentally critical to be filled. Such behavior can also impact neighboring wetland areas when the filling is done without the appropriate management practices necessary to minimize such impacts. This latter type of adverse environmental impact is the very outcome that occurred in this case as a result of Phoenix's premature filling of the wetland.

b. *Environmental Harm*

The Presiding Officer not only concluded that Phoenix's actions caused harm to the regulatory program, but also that Phoenix caused actual environmental harm to areas outside the permitted land. Init. Dec. at 7. She specifically found that Phoenix's activities led to deposits of sediment six to seven feet[48] beyond the permitted area, causing the "needless and rather wanton destruction of wetlands vegetation." *Id*.; *accord id.* at 19. Phoenix argues that the Presiding Officer's finding of environmental harm was contrary to the evidence. The gist of Phoenix's theory appears to be that, although some small amount of silt filtered through the permitted site boundaries during construction, at the time of the hearing, healthy wetland vegetation was present at that location. *See* Resp't Appeal Br. at 12. In support of this argument, Phoenix cites to the testimony of Michael Wylie,[49] the Region's wetlands enforcement expert, and Jason Steele, an environmental specialist previously at DEP, now at the Corps of Engineers, both of whom, Phoenix claims, testified that there was no environmental damage to the surrounding wetlands. *Id.* at 8-9.

In her environmental harm analysis, the Presiding Officer did not mention the testimony of either of these two witnesses.[50] Presumably, she either did not find it relevant or did not find it credible and, as we

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[48] Although the Presiding Officer initially states that the harm to the environment extended out fifteen feet, *see* Init. Dec. at 7, which was the size of the impacted wetlands according to the Region, both the testimony she specifically cites and her findings of Fact and Conclusions of Law state that the harm extended out six or seven feet, *see id*. at 19. We conclude from the record that the harm extended out six to seven feet.

[49] We note that although this witness's name is spelled "Wiley" throughout the transcript, the Region spells his name "Wylie" in its brief. We will use "Wylie" throughout the remainder of this decision.

[50] The Presiding Officer did not explicitly rely upon either the testimony of Mr. Wylie or Mr. Steele with respect to the question of actual environmental harm; she did, however, cite Mr. Wylie's testimony regarding the quality of the impacted wetland area.

discuss below, we agree with her implicit determination. Instead, the Presiding Officer appears to have relied solely on the testimony of Mr. Negron, an EPA wetlands scientist, in finding that "Respondent failed to install and adequately maintain erosion control devices, resulting in the deposit of silt approximately 6 to 7 feet beyond the boundaries of the permitted area."[51] Init. Dec. at 19 (Findings of Fact and Conclusions of Law ¶11); *see also id.* at 4 (citing Tr. at 219) (noting that wetlands vegetation was destroyed by the sedimentation). As discussed above in section IV.A, Mr. Negron testified, based upon his personal observations at the site in 1999, that the adjacent wetland areas had been adversely impacted by eroding soil – the vegetation was being smothered and the function of those wetlands destroyed – because the erosion control devices were not functioning effectively. Tr. at 213. His testimony was not rebutted, undercut, or contradicted. Accordingly, contrary to Phoenix's assertion that "[t]here is absolutely no evidence that any damage to surrounding wetlands was incurred," Resp't Appeal Br. at 9, we find that there *was* sufficient evidence in the record to establish environmental harm. Moreover, as mentioned previously, the Board typically gives deference to a presiding officer's factual findings where credibility of witnesses is at issue. In this case, the Presiding Officer apparently viewed Mr. Negron as the most credible of the witnesses that testified about the environmental harm at the site. As we discuss below, we see no error in this. Indeed, Mr. Negron's testimony appears to us to

[51] Although she does not cite to a specific witness or to precise pages of the transcript in her Findings of Fact and Conclusions of Law determination regarding environmental harm, earlier in the Initial Decision, the Presiding Officer states that "additional testimony established that the filling itself * * * caused environmental harm * * *. The silt fences, while at some point erected, were 'actually worthless', causing significant erosion, resulting in the deposit of silt approximately 6 to 7 feet beyond the permitted boundaries." Init. Dec. at 4 (citing Tr. at 219). This point, which solely references the testimony of Mr. Negron, is nearly identical to the one pertaining to environmental harm made in her Findings of Fact and Conclusions of Law. Thus, we infer that she relied solely on Mr. Negron's testimony on this point.

provide the most clear and unequivocal evidence regarding the question of harm.[52]

Because both parties claimed that the testimony of both Mr. Wylie and Mr. Steele supported their arguments with respect to this issue in their post-hearing briefs, *see* Resp't Proposed Findings of Fact and Conclusions of Law at 5-6; Compl't Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief at 12, we have reviewed the testimony of these other two witnesses. Upon review of this testimony, and in particular the segments Phoenix cites, we conclude that Phoenix has greatly overstated the value of the testimony on the question of environmental harm to the neighboring wetlands.

In reviewing Mr. Wylie's testimony, we do not find, as Phoenix contends, that Mr. Wylie testified that "[h]e could not identify any environmental damage to the wetlands surrounding the permitted area." Resp't Appeal Br. at 8 (citing Tr. at 385, 386).[53] Rather, in that section of his testimony, Mr. Wylie stated that, during his visit to the site on the Tuesday before the hearing (which took place over two-and-a-half years after the filling of the wetlands at Frank Brown Park), he observed a ten- to fifteen-foot wide zone of vegetation next to the filled soccer fields that differed from that of the adjacent pine flatwood wetland. Tr. at 385. Mr. Wylie admitted, however, on cross-examination that he did not know where the precise border ran between the permitted and non-permitted wetland areas. *See id*. at 386. Without this pivotal piece of information, i.e., whether this zone of "different" vegetation was located outside the permitted area, Mr. Wylie's testimony is insufficient to establish whether or not there was environmental harm to the wetlands adjacent to the permitted area. Notwithstanding this rather ambiguous evidentiary passage, we note that earlier in his testimony, Mr. Wylie explained that

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[52] Mr. Wylie's testimony regarding the sedimentary damage at the site that he saw in the photographs also provides some support for Mr. Negron's testimony. *See infra* notes 53-54 and accompanying text.

[53] Interestingly, the Region cites this very same testimony as record support for its position that there *was* environmental harm, an argument diametrically opposed to Phoenix's. *See* Reg. Cross-Appeal Br. at 22.

installation of adequate erosion controls *prior* to construction is a very important protective management practice because soil used for fill "immediately slough[s] off" after any kind of rain, thereby "smother[ing] the inherent flora and fauna." *Id*. at 370. He further testified that this smothering was seen in some photographs[54] of the site. *Id*. at 371. Consequently, Mr. Wylie's testimony as a whole, rather than supporting Phoenix's argument, seems instead to refute it, at least insofar as there was noticeable harm to the adjacent wetlands shortly after the filling occurred.

Similarly, Mr. Steele's testimony does not provide significant support for Phoenix's position. Mr. Steele, upon being shown three photographs[55] that he indicated were not altogether clear, testified that there appeared to be some "healthy" wetland vegetation[56] behind the silt fences in two of the photographs.[57] *See id*. at 432-36. Mr. Steele later testified that the vegetation closer to the silt fence area appeared to be of a different nature – transitional plants, as opposed to strict wetland plants[58] – than those further away from the impacted area. *Id*. at 454-56.

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[54] These photographs appear to have been taken shortly after the filling of the site and are not the same photographs Mr. Steele discusses in his testimony, which is described below.

[55] Later testimony established that these photographs were taken along the north side of the soccer fields at Frank Brown Park on October 4, 2001, almost two-and-a-half years after the filling of the wetlands. Tr. at 474.

[56] In the course of this testimony, if the vegetation in the photograph was green, it was apparently assumed to indicate "healthy" vegetation. Tr. at 435.

[57] With respect to photo 3, Mr. Steele testified that, because of the angle from which the picture was taken, "the vegetation that we're looking at is hundreds of feet, 20 feet back from the silt fence, so I can't tell in the area directly behind the silt fence if that area is healthy or not." Tr. at 435.

[58] Mr. Steele explained that the vegetation he saw in the photographs near the silt fences appeared to be "a rosewood and uplands * * * bracken fern and andro-pogon [sic]." Tr. at 455. He indicated that these plants are generally considered transitional plants. *Id*. He further explained that "on an impacted site, if it's a wetland that's been (continued...)

Thus, although the cited testimony may suggest that there has been some re-vegetation in neighboring wetland areas, it also may suggest that the new growth, rather than being strictly wetland vegetation, consists of transitional plants (which include both wetland and upland plants). Hence, the quality of the wetlands may have been diminished. Taking into consideration this portion of testimony on its face as a whole, including that the healthiness of the vegetation was determined solely by its color in the photographs and that the photographs themselves were not all that clear, we conclude that this testimony does not provide substantial evidence for either party's position.

In sum, based upon our review, we conclude that the Presiding Officer correctly found that the Region had proved by a preponderance of the evidence that there were adverse environmental impacts to the adjoining wetlands either during or immediately following Phoenix's illegal activities at the site and lasting for some time thereafter. This finding was based on the unrebutted evidence of Mr. Negron, a wetlands expert. We do not find it surprising that the Presiding Officer did not rely on the testimony of Mr. Wylie and Mr. Steele in her environmental harm analysis for the reasons described above.

That being said, however, Phoenix's arguments do raise a question about the permanence of the environmental harm to the adjacent wetlands. Although the Region sufficiently demonstrated that Phoenix's activities caused harm to the surrounding wetland areas in 1999, Phoenix, through its own testimony and cross-examinations at the hearing, raised the issue of whether such harm had been temporary. Upon reading the transcript, we do not find that the Region provided sufficient evidence to demonstrate that it was more likely than not that such harm has been permanent.[59] Most notably, at the hearing neither side presented

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[58](...continued)
impacted by, say fill being placed on it, you'll start receiving some transitional plants that either grow either [sic] entirely in uplands or in uplands and wetlands." *Id*.

[59] As we mentioned previously, Mr. Wylie's testimony regarding the zone of "different" vegetation seen at the site two-and-a-half years later was unpersuasive, as he (continued...)

testimony of a witness knowledgeable in the area of wetlands delineation, who had recently visited the site in order to ascertain whether the impacted area *outside the area given an after-the-fact permit* had indeed been completely restored to its original condition. Such testimony would have provided substantially more weighty evidence on this question than the testimony presented. We also find, however, that nothing in the Initial Decision indicates that the Presiding Officer had made a finding of permanent harm in calculating the penalty. Her discussion was limited to the testimony showing impacts from Phoenix's filling activities at the time of the activities and shortly thereafter. Thus, we do not find clear error or abuse of discretion in her finding of environmental harm or in her penalty assessment based upon this point.

c. *Quality of the Wetlands*

In its appeal, Phoenix also contends that the Presiding Officer erred in considering the quality of the wetlands as part of her penalty assessment "because it was those wetlands which were anticipated to be filled and ultimately permitted to be filled." Resp't Appeal Br. at 12; *accord id.* at 2 (Issues Presented for Review No. 3). Phoenix, however, has missed several critical points about the Presiding Officer's findings, which we discuss below.

As a preliminary matter, we note that, in assessing the gravity or seriousness of any violation, the Agency customarily considers "the sensitivity of the environment" at the location where the violation occurred. *Penalty Framework* at 15.[60] In an illegally-filled wetlands

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[59](...continued)
did not know whether this zone was outside the permitted area. Similarly, Mr. Steele's testimony, which was based upon photographs of the site over two-and-a-half years after the filling, while suggesting that Phoenix's activities *may* have altered the type of vegetation present in the adjacent wetlands, was lacking in sufficient certainty to meet the Region's burden of proof.

[60] The *Penalty Framework* provides that, in evaluating the "actual or possible harm" criterion of the gravity portion of the penalty assessment, a consideration of the amount of the pollutant, the toxicity of the pollutant, *the sensitivity of the environment*, (continued...)

case, a "sensitivity of the environment" analysis would almost always necessarily include a consideration of the quality of the wetlands impacted. Consistent with this, numerous courts assessing penalties for section 404 wetlands violations have mentioned the quality of the wetland in the remedy phase of their decisions. *E.g., Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV.S97-0858 GEBJFM, 1999 WL 1797329, at *20, 21 (E.D. Cal. Nov. 8, 1999) (finding the wetlands to be important for supporting endangered species and referring to them as "rare federal wetlands" in considering an appropriate penalty), *aff'd in part & rev'd in part on other grounds,* 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (mem.); *United States v. Banks*, 873 F. Supp. 650, 656, 659 (S.D. Fla. 1995) (considering the importance and scarcity of the type of wetland impacted), *aff'd*, 115 F.3d 916 (11th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1999); *United States v. Van Leuzen*, 816 F. Supp. 1171, 1179 (S.D. Tex. 1993) (determining that the filled wetland was "ecologically of great value" and of a "unique quality"); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965 (S.D. Fla. 1989) (considering the importance to the ecosystem of the illegally-filled water and wetlands in its analysis of the seriousness of the violation); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 280 (EAB 1999) (noting that the presiding officer found the filled area to be a relatively small, low-value wetland).

In her penalty calculation, it is unclear to what degree, if at all, the Presiding Officer considered the quality of the wetlands for that portion of the site for which a permit was ultimately granted. Although she generally mentions the quality of the wetlands in connection with both the after-the-fact permitted area and the adjacent, non-permitted area,[61] she does not explicitly state that she imposed any portion of the

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[60](...continued)
and the length of time a violation continues should be included, as appropriate. *Penalty Framework* at 15 (emphasis added).

[61] It is not surprising that the same description of the wetlands, including their quality, was applicable both to the area that was intentionally filled (and eventually given an after-the-fact permit) and the adjacent, non-permitted, impacted wetlands, as the two (continued...)

penalty amount based upon the quality of those wetlands later covered by a permit. What is clear, however, about the Presiding Officer's consideration of the quality of the wetlands at the site, and what Phoenix has failed to acknowledge, is that the analysis clearly focused on the adjoining, non-permitted wetlands that were impacted by Phoenix's filling operation. Thus, for example, although in her Findings of Fact and Conclusions of Law the Presiding Officer more generally states that "[t]he wetlands *filled and impacted* were of medium quality," Init. Dec. at 18 (emphasis added), in her more specific discussion regarding the nature, circumstances, extent, and gravity of the violation, she explicitly refers to the *"impacted additional* wetlands * * * beyond the construction border" and immediately thereafter states that one of the witnesses testified that "the *impacted wetlands*, while not pristine, are medium quality wetlands that perform important and valuable water quality, flood attenuation, and wildlife habitat functions," *id*. at 3 (emphasis added) (relying on Tr. at 220, 366-69). In addition, the testimony she relies upon in making these findings focused predominantly on the adjoining wetlands and the resultant harm to them. *See* Tr. at 219-21 (discussing impacts on, and the quality of, the adjacent wetlands); *see also id*. at 366-71 (describing the wetlands at the Frank Brown Park site as a whole, but then leading into the inadequate erosion controls used and the ensuing harm to the neighboring wetlands). The Presiding Officer's statements clearly demonstrate that at least part, if not all, of her discussion about the quality of the wetlands was in the context of considering the extent of environmental harm to the wetlands adjacent to the permitted area and in including such harm in the penalty calculation. We find no error on this point, and, insofar as Phoenix suggests that the quality of the neighboring, adversely impacted wetlands is unimportant or irrelevant to the gravity of the violation or to the penalty, such assertion is patently incorrect.[62]

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[61](...continued)
areas are contiguous.

[62] As mentioned above, *see supra* note 42, the Agency's penalty policy lists "actual harm" as one of the factors to consider in the gravity portion of a penalty assessment.

Further, whatever weight the Presiding Officer put on the quality of the wetlands eventually authorized to be filled in her assessment of the gravity portion of the penalty was tempered by her consideration of the fact that the filling of those particular wetlands was ultimately authorized by a permit. Init. Dec. at 4 ("It would be remiss to assess a penalty based upon harm to the environment resulting from the filling of the 3.5 acres of wetlands while ignoring the fact that the filling of those wetlands was ultimately authorized by a permit."). Moreover, to the extent the Presiding Officer may have considered the quality of the wetlands that were ultimately authorized to be filled in assessing the penalty,[63] we do not believe it to be erroneous to consider quality to some degree, especially in light of the fact that during the time the wetland was illegally filled (i.e., prior to the actual issuance of the after-the-fact permit), some function that would have been present had the law not been

[63] Phoenix actually seems to imply that the quality of the wetland should never be considered for a site that is granted an after-the-fact permit as it would always be an irrelevant consideration. We disagree with such a sweeping, across-the-board rule. The gravity portion of a penalty assessment, while typically containing several well-established and generally applicable factors, may also take into account other factors. *See Penalty Framework* at 16 ("the [gravity] factors listed above are not meant to be exhaustive"). Penalty assessments are also, to a significant degree, fact-specific. Thus, there may be some cases in which the quality of an illegally-filled wetland, even though an after-the fact permit was issued, could be a substantial consideration. We do not believe that after-the-fact permits always reflect what the Corps would have initially granted, since the "permittee" has already filled the entire acreage by the time the Corps issues an after-the-fact permit and because the after-the-fact permit may have been issued as a part of a negotiation or settlement between the regulatory agencies and the "permittee." In other words, had the permittee waited for the permit to be issued in the first place, rather than prematurely filling the site, the permit may have, in the end, authorized less than was actually filled. In fact, there may even be cases where the permit would likely never have been granted because of the importance of such a wetland but, because the filling has already occurred, the cost to restore it is substantial, restoration would likely not return the function of the wetland to its original state, and/or there is a possibility that nearby land may be successfully modified in mitigation, the court may only assess a fine. *See United States v. Bd. of Trs. of Fla. Keys Cmty. Coll*, 531 F. Supp. 267, 275 (S.D. Fla. 1981) (fining defendants and allowing mitigation at an alternative site in lieu of restoration of the filled wetland because of a combination of factors associated with the practicalities of the situation). In such cases, the quality of the wetland would be an important consideration in assessing a penalty. *See id.* at 271-72, 275 (considering the quality of the impacted wetland in detail).

violated was completely lost as well.[64] *See United States v. Van Leuzen*, 816 F. Supp. 1171, 1179 (S.D. Tex. 1993) (finding that prior to complete restoration of function, "the time during which the wetland is filled is completely lost to the environment"). Furthermore, any consideration of the quality of the filled and ultimately permitted wetlands was part of a much larger examination of several other important factors, such as the number of days of the violation, the fact that Phoenix continued its activities after being notified by authorities to stop, harm to the regulatory program, and harm to the adjacent wetland area, which together led to the imposition of the gravity portion of the penalty.

Accordingly, for these reasons, we hold that the Presiding Officer's mention of the quality of the wetland area that was later authorized to be filled [65] does not constitute clear error or an abuse of discretion.

d. *Number of Days of Violation*

Although Phoenix, in its "Statement of the Issues Presented for Review," does not list as an issue the number of days of the violation, Phoenix later argues in its brief that the only date for which there is "clear evidence" of filling was "on or about May 4, 1999." Resp't Appeal Br. at 15; *see also id.* at 14 (arguing that "[t]he record in this case does not show clearly that there was anything but a single violation"). Phoenix further argues that in order to "sustain the Complainant's request for a maximum penalty of $27,500, the record should show at least three independent events showing violations." *Id*. at 15. Phoenix relies upon *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989), for this argument. In *Hanson*, the district court held that, even though a $24,000 Class I penalty assessment was within the overall statutory

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[64] We recognize that this time period will often be short, as once the permit is granted and the wetland filled, such function will be permanently lost.

[65] As we have already mentioned, it is not clear whether her consideration of the quality of the wetlands was, in reality, solely focused on the portion of the wetlands that were never permitted or whether she considered the quality of both the after-the fact permitted wetlands and those adjacent, impacted wetlands.

maximum of $25,000, there must also have been at least three independent events that constituted violations in order for the assessment to fall within the $10,000[66] statutory "per violation" maximum. *Id*.

As noted above, the predicate for Phoenix's argument is that there was clear evidence of a violation on only one day, May 4, 1999, supporting the finding of only one violation. Resp't Appeal Br. at 15; *see also* Resp't Proposed Findings of Fact and Conclusions of Law at 10; Resp't Reply to Complainant's Proposed Findings of Fact and Conclusions of Law and Post-Hearing Br. at 4. In the Initial Decision, however, the Presiding Officer held that "the illegal activity occurred on at least five separate days." Init. Dec. at 5. In particular, she found that the activity was conducted, at a minimum, during the following days: May 1, May 3, May 4, May 6, and May 10, 1999. *Id*. at 18. She relied on the "uncontested testimony" of one of the Region's witnesses to establish that the filling occurred, at a minimum, on May 4, 1999.[67] *Id*. (citing Tr. at 421-22). For two of the additional days of violation which she found to have occurred, the Presiding Officer relied upon one of Phoenix's witnesses, Mr. Edmond Schoppe, IV, who testified that the filling itself would have most likely occurred over a two- or three-day period, beginning on Saturday (May 1, 1999), continuing on Monday (May 2, 1999), and ending on Tuesday (May 4, 1999),[68] the date about which Mr. Steele testified. *Id*. (citing Tr. at 506). Finally, she also relied

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[66] The maximum amount per violation has been increased to $11,000 since the *Hanson* decision. *See supra* note 8. This $1,000 increase, however, does not change the underlying *Hanson* calculus that, in order to assess a penalty of $23,000 as was done by the Presiding Officer, the Region would have had to prove a minimum of three violations in this case.

[67] Mr. Steele testified that when he visited the site on May 4, the entire site appeared to have been cleared and filled by the time he arrived. Tr. at 45-46, 421-21, 446-48. Some work was apparently still ongoing at the site, however, as the witness also testified that he spoke with some of Phoenix's employees, including one individual on a bulldozer. *Id*. at 45.

[68] Mr. Schoppe stated that, to his "best recollection," the work was to have started on Saturday, May 1, 1999, and that, in his "best judgment," it would have continued on Monday and stopped on Tuesday. Tr. at 506.

on the testimony of eyewitnesses (not specifically identified by her in the Initial Decision) that Phoenix was conducting activities at the site on May 6th[69] and May 10th.[70] *Id*.

As a legal matter, it is clear that filling of a jurisdictional wetland without a section 404 permit violates the CWA. *E.g., Tull v. United States*, 481 U.S. 412, 414 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 261 (EAB 1999). Courts have also held that activities such as the leveling and/or grading of a wetland violates the Act when done without a permit. *United States v. Brace*, 41 F.3d 117, 122-23 (3d Cir. 1994) (affirming district court's finding that "clearing, churning, mulching, leveling, grading and landclearing" was a discharge), *cert. denied*, 515 U.S. 1158 (1995); *United States v. Huebner*, 752 F.2d 1235, 1243 (7th Cir.) (affirming lower court's determination that moving around mounds of dirt with a bulldozer and leveling it constitutes a discharge), *cert. denied*, 474 U.S. 817 (1985); *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897, 922-25 (5th Cir. 1983) (landclearing of wetland by deliberate leveling of sloughs held to have constituted a discharge of fill material); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV.S97-0858 GEBJFM, 1999 WL 1797329, at *15 (E.D. Cal. Nov. 8, 1999) (holding that deep ripping and discing are violations of the CWA), *aff'd in part & rev'd in part on other grounds,* 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (mem.); *United States v. Cumberland Farms, Inc.*, 647 F. Supp. 1166, 1185 (D. Mass. 1986) (finding that "moving and grading and filling the top soil" and "operating a backhoe" were violations of the cease and desist order), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). Contrary to Phoenix's arguments that there was

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[69] We assume the Presiding Officer was referring to Mr. Doug Gilmore, who testified that he visited the area on May 6, 1999, and saw a bulldozer leveling dirt at the site. Tr. at 116-17.

[70] We assume the Presiding Officer was referring to Mr. Steele, who testified that when he returned to the site on May 10, 1999, he saw a bulldozer operating in the wetland area in question, apparently grading and/or leveling down the site. Tr. at 51-52, 60.

no clear evidence of violations on more than one day, witnesses testified that there was evidence of filling, leveling and/or grading during five separate dates.[71] The Presiding Officer clearly found these witnesses credible, as she relied upon their testimony in concluding that the violations occurred, at a minimum, on five days. As the Presiding Officer's finding of five days of violation depends on her assessment of the credibility of these above-mentioned witnesses, we defer to her conclusions on this point.[72]

Phoenix's reliance on *Hanson* is unavailing. In *Hanson*, as we mentioned above, the district court held that where a $24,000 class I penalty was assessed, there must have been at least three independent events that constituted violations so as to not exceed the $10,000 statutory "per violation" maximum. 710 F. Supp. at 1109. Consequently, using the *Hanson* court's analysis, in order for the Presiding Officer to have assessed a penalty of $23,000 here, three separate violations would have had to be established. Phoenix argues that there was only clear evidence of violation on one day. As the Presiding Officer found, at a minimum, evidence of violations on five

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[71] Moreover, a number of courts have also held that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation." *Sasser v. Adm'r*, 990 F.2d 127, 129 (4th Cir. 1993), *aff'g In re Sasser*, 3 E.A.D. 703 (CJO, 1991); *accord Cumberland Farms,* 647 F. Supp. at 1183 ("A day of violation constitutes not only a day in which Cumberland was actually using a bulldozer or backhoe in the wetland area, but also every day Cumberland allowed illegal fill material to remain therein."); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 964 n.1 (S.D. Fla. 1989); *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987). *But see Borden Ranch*, 1999 WL 1797329, at *15 (holding that "the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty"). In this case, as the Presiding Officer only considered a day when activities were actually ongoing as a "day of violation," and as only a Class I penalty is at issue (for which a maximum of $27,500 may be assessed, *see supra* note 8 and accompanying text), we need not reach the question of whether it would have been appropriate to consider each day that the fill remained in the wetland as a separate violation.

[72] Once this testimonial evidence is found to be credible, as it was here, we would agree with the Presiding Officer's determination that it was more likely than not that the filling, leveling, and/or grading of the wetland proceeded over at least five days.

separate days,[73] the penalty assessment is clearly within the statutory maximum and, therefore, we find no clear error or abuse of discretion on this point.

e. *Consideration of "Mitigating Factors"*

As mentioned previously, *see* section V.C, Phoenix has listed a number of facts which it claims the Presiding Officer erred in failing "to find as significant mitigating factors." Resp't Appeal Br. at 2-3. Phoenix also alleges that the Presiding Officer failed to consider its "post-complaint compliance" in assessing the penalty. *Id*. at 3, 14. We will briefly address each of the potential "mitigating factors" and Phoenix's alleged post-complaint compliance in turn below.[74]

i. *City was permittee*

Phoenix first argues that the Presiding Officer erred in failing to find as a significant mitigating factor the fact that the City, and not Phoenix, was responsible for obtaining the required permits. *Id.* at 2. It is clear that the Presiding Officer did consider this fact in the gravity portion of her analysis as well as considering whether this factor merited a decrease in the penalty as one of "such other factors as justice may require." *See* Init. Dec. at 5, 15. She decided, however, that although contractors are typically deemed less culpable than the project sponsor

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[73] Furthermore, even if we were to assume that the filling took only two days (Mr. Schoppe's minimum "best judgment" estimate) and was completed on Tuesday, the day Mr. Steele observed a bulldozer at the site and the date Phoenix concedes there was evidence of a violation, there would still be sufficient evidence of four days of violation because of the two subsequent dates when witnesses observed Phoenix's employees grading the site. Four days of violation could still result in a penalty assessment of $23,000 without exceeding the statutory "per violation" maximum.

[74] Phoenix also lists the lack of environmental harm done to the surrounding wetlands as one of the "mitigating" circumstances that the Presiding Officer failed to find significant. *See* discussion *supra* section V.C. Because we have already concluded that the Presiding Officer did not err in concluding that there was some adverse environmental effects on the adjacent wetlands, see *supra* section V.D.2.b, we need not address *lack* of environmental harm as a mitigating factor.

in CWA wetland cases, often because the sponsor is disseminating incorrect and/or misleading information to the contractor which the contractor then relies upon to his detriment, under the facts and circumstances of this particular case, a decrease in the penalty was not warranted. Unlike the contractors in *United States v. Board of Trustees of Florida Keys Community. College*, 531 F. Supp. 267, 271 (S.D. Fla. 1981), *United States v. Van Leuzen*, 816 F. Supp. 1171, 1175 (S.D. Tex. 1993), and *In re Urban Drainage and Flood Control District*, Dkt. No. CWA-VIII-94-20-PHII, Findings of Fact ¶ 15 (ALJ 1998), who had been led to believe that a permit had been issued by the landowners, she found the opposite was true here, i.e., that the testimony showed that Phoenix knew that a permit had *not* as yet been issued. Init. Dec. at 15-16. Thus, there had not been dissemination of incorrect or misleading information that led to Phoenix's violations here. Furthermore, the Presiding Officer found Mr. Finch's "self-serving" claims that the City Councilman and the Mayor told him to go ahead with the filling not credible, especially in light of the fact that neither of those persons testified. *See id.* at 13 n.5. We defer to the Presiding Officer's credibility determination and find no clear error or abuse of discretion in the Presiding Officer's failure to reduce the penalty on these grounds.

ii. *Permit was pending, approval was imminent*

As for Phoenix's argument regarding its second potential "mitigating factor" – that these permits had been applied for and were about to be issued[75] – the Presiding Officer likewise considered these facts both in the gravity portion of her analysis and as one of "such other factors as justice may require." *See id*. at 5, 15. She specifically found that these facts were not sufficiently mitigating to warrant a decrease in

[75] Phoenix's argument is a little misleading as the record indicates that only the State, and not the federal, permit had been expected to have been issued soon. Tr. at 112-15, 196. With respect to the different time frames for issuance of the two permits, Phoenix argued that it had been confused and had assumed the two permits would be jointly issued. *Id*. at 471-73, 476-77. Responding to Phoenix's argument, the Presiding Officer determined that, even had Phoenix been confused by the fact that the permits were not to be jointly issued, this still did not excuse the premature filling of the wetland, as even the state permit had not yet been issued. Init. Dec. at 16-17.

the penalty. As discussed above, *see* section V.D.2.e.i, the Presiding Officer determined that this was not a case in which the project sponsor gave Phoenix, as the contractor, incorrect or misleading information about the status of the permit. Moreover, she stated that "in light of Phoenix's experience in the construction industry, it knew or should have known that without a written permit[,] commencing work would be a violation." *Id*. at 16. We likewise find no clear error or abuse of discretion in the Presiding Officer's failure to reduce the penalty based on these facts.[76]

iii. *Belief that permit was approved*

As for Phoenix's argument that it "was led to believe that an agreement had been reached * * * and the permit application had been approved," Resp't Appeal Br. at 2-3, the Presiding Officer not only considered this issue, she specifically concluded from the record that this claim was *not* credible. *See* Init. Dec. at 13, n.5; *see also supra* section V.D.2.e.i. She based her conclusion primarily on her evaluation of the credibility of the witnesses. *See supra* section V.D.2.e.i. In addition, she observed that "[e]ven assuming that Respondent had reasons to believe permits had been issued * * *, the company could have protected itself merely by requiring a copy of the necessary permits to be shown to them prior to the commencement of the work." Init. Dec. at 13 (referencing *Fla. Keys Cmty. Coll.*, 531 F. Supp. at 274).[77] In fact, it would seem necessary for a contractor to obtain a copy of the permit, as it would

[76] In fact, "a good faith but mistaken belief that a federal permit would eventually be issued under the joint application process[]constitutes self-help for the impatient," a practice of which, like the Fifth Circuit, we cannot condone. *Fla. Keys Cmty. Coll.*, 531 F. Supp. at 274 (quoting *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418, 427 (5th Cir. 1973) and *Weiszmann v. Dist. Eng'r, U.S. Army Corps of Eng'rs*, 526 F.2d 1302, 1305 (5th Cir. 1976)).

[77] The contractor in *Florida Keys Community College* also argued that it relied in good faith on the landowner's representatives. The district court, while assessing a lesser fine upon the contractor than the landowner, aptly stated that the application of the CWA does not "impose an unreasonable burden on construction companies. The companies may protect themselves merely by requiring a copy of the necessary permits to be shown to them prior to the commencement of the work." 531 F. Supp. at 274.

ensure that the contractor was fully aware of all the conditions that the Corps had imposed upon the filling of the site. We defer to the Presiding Officer's credibility determination and find no clear error or abuse of discretion in her failure to reduce the penalty on these grounds.

iv. *Belief that oral approval sufficient*

As for Phoenix's claim that it "was not familiar under what circumstances, or even whether, a regulator can give verbal permission to proceed before the actual permit document is delivered," Resp't Appeal Br. at 3, the Presiding Officer discussed this contention at least twice in the Initial Decision. *See* Init. Dec. at 13, 15. She concluded that this was not an appropriate factor for mitigating the penalty in this case because Phoenix, as an experienced contractor in the construction business, "knew or should have known that without a written permit commencing work would be a violation." *Id*. at 16. Again, based on the facts and circumstances of this case, we find no clear error or abuse of discretion in her failure to reduce the penalty on these grounds.

v. *Issuance of after-the-fact permit*

Phoenix also contends that the Presiding Officer "misapplied the significance of the fact that a permit was * * * ultimately issued after the fact." Resp't Appeal Br. at 2. Phoenix, however, does not provide further analysis to support its contention. Nor does it suggest an amount it believes the Presiding Officer should have deducted from the penalty based on this factor, other than to generally assert that an overall fine of $500 would be appropriate in this case.[78] *Id*. at 18.

Phoenix does not dispute that the Presiding Officer considered this factor in her analysis. Indeed, the Presiding Officer stated that "[i]t would be remiss to assess a penalty based upon harm to the environment

[78] In its post-hearing brief, Phoenix stated that it deserved a penalty markedly less than the $11,000 maximum "per violation" penalty, *see* Resp't Proposed Findings of Fact and Conclusions of Law at 10-11, and suggested an amount similar to the *de minimis* $10 per violation penalty the court awarded in the *Hanson* case. *Id*. at 12 (citing *Hanson v. United States*, 710 F. Supp. 1105 (E.D. Tex. 1989)).

resulting from the filling of the 3.5 acres of wetlands while ignoring the fact that the filling of those wetlands was ultimately authorized by a permit." Init. Dec. at 5. In the end, however, after weighing this factor with all the other facts and circumstances, including that Phoenix's activities had harmed adjacent wetland areas and the regulatory program, she concluded that the nature, circumstances and gravity of Phoenix's violation was significant, and assessed a $20,000 penalty.[79] We can find no clear error or abuse of discretion in her decision not to substantially reduce the penalty based on the after-the-fact permit issuance.

vi. *Post-complaint compliance*

Finally, Phoenix maintains that the Presiding Officer erred in failing to consider its "post-complaint compliance." Resp't Appeal Br. at 3. Phoenix relies on the testimony of Victor Keisker, a DEP biologist who conducted a compliance inspection on October 20, 1999, approximately one month after DEP's issuance of an after-the-fact permit. Tr. at 232-34. He found that the erosion control measures were still inadequate. *Id*. at 239-40. After he informed Phoenix of the deficiencies, Phoenix remedied the situation within a few days. *Id*. at 240. Phoenix apparently believes its "few day" turnaround time warrants a penalty reduction, although it had been told approximately six months prior to Mr. Keisker's visit that it needed to take adequate control measures. Phoenix also cites to post-complaint "compliance" measures it has taken "to ensure that future environmental concerns are properly addressed." Resp't Appeal Br. at 14. Specifically, Phoenix refers to the testimony of one of its managers regarding measures it has taken to

[79] Although she did not include an itemized breakdown of her penalty assessment (along with the amount "subtracted" for the Corps' issuance of an after-the-fact permit), the Presiding Officer did impose a smaller penalty than the statutory maximum and her analysis was sufficiently detailed to provide the parties with the basis underlying the assessed penalty. *See In re City of Marshall*, CWA Appeal No. 00-9, slip op. at 24 n.34 (EAB, Oct. 31, 2001), 10 E.A.D. ___.

"prevent adverse environmental impact[s] on all subsequent jobs."[80] *Id*. at 10 (citing Tr. at 470-71).

Post-complaint compliance is not listed as one of the statutory penalty factors that the Agency must consider in assessing an administrative penalty under section 309(g).[81] *See* 33 U.S.C. § 1319(g)(3). We assume, as did the Region, that Phoenix requests its after-the-fact compliance at the site and its company's improved environmental practices be considered under the statute's "such other matters as justice may require" penalty criterion (the "justice factor").[82] *See id*.

The statute does not specify what particular facts and circumstances might come within the justice factor, nor does it dictate how to apply this factor. In considering analogous justice factor penalty provisions under other statutes, the Board has explained that, as a general matter, the justice factor "vests the Agency with broad discretion to reduce the penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *In re Spang & Co.*, 6 E.A.D. 226, 249 (EAB 1995) (emphasis omitted) (discussing the justice factor utilized in the Agency's Enforcement Response Policy ("ERP") for Section 313

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[80] In order to preempt any future compliance problems, Phoenix plans to call DEP to come out to the site at the beginning of the filling activities, as soon as the erosion control measures are in place, rather than waiting for a DEP inspection after the filling is complete. Tr. at 470.

[81] The statute, however, requires *federal district courts,* when assessing penalties under CWA section 309(d), to consider "any good-faith efforts to comply with the applicable requirements." 33 U.S.C. § 1319(d). As mentioned previously, sections 309(d) and 309(g), the two sections governing civil penalties, are similar, but not identical. *See supra* note 36. One of the key differences between these two CWA statutory provisions is that section 309(d) requires consideration of "any good-faith efforts to comply with the applicable requirements" whereas section 309(g) requires a consideration of the violator's "degree of culpability." *Compare* 33 U.S.C. § 1319(d) *with* 33 U.S.C. § 1319(g)(3).

[82] In its post-hearing brief, Phoenix listed post-complaint compliance as a basis for seeking a penalty reduction under the rubric of "such other matters as justice may require." *See* Resp't Proposed Findings of Fact and Conclusions of Law at 11.

of the Emergency Planning and Community Right-to-Know Act ("EPCRA")); *accord In re Pepperell Assocs.*, 9 E.A.D. 83, 113 (EAB 2000) (discussing the justice factor found in a different CWA penalty provision than the one at issue here)*; In re Steeltech, Ltd.*, 8 E.A.D. 577, 594-95 (EAB 1999) (discussing the justice factor in the Agency's ERP for EPCRA); *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 216 (EAB 1999) (considering the EPCRA justice factor), *aff'd*, No. CV 99-07357 (C.D. Cal. Feb. 18, 2000). Applying this factor to reduce a penalty assessment should therefore be "far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *Spang*, 6 E.A.D. at 250; *accord Pepperell*, 9 E.A.D. at 113.

The Board has also identified one area – evidence of a violator's past positive actions – in which courts have historically taken the justice factor into account for purposes of penalty mitigation.[83] *Spang*, 6 E.A.D. at 249*; see also Pepperell*, 9 E.A.D. at 113-14. There, too, the standard for invoking this factor is high, such that "the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *Spang*, 6 E.A.D. at 250; *accord Pepperell*, 9 E.A.D. at 113-14.

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[83] Several federal district courts have stated that a court may consider a defendant's compliance record as part of the justice factor. *E.g.*, *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 353 (E.D. Va. 1997), *aff'd in part, rev'd in part,* 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *see also United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 445, 446 (W.D. Pa. 2002) (considering compliance measures in both its analysis of the section 309(d) "good faith efforts to comply" factor and its assessment of the justice factor). At least one of those courts, however, has held that, where all the good faith efforts to comply with the CWA occurred post-enforcement, this factor weighed heavily against defendant and not for it. *See, e.g.*, *Allegheny Ludlum*, 187 F. Supp. 2d at 445-46 (noting that defendant's good faith compliance "sprung not from internal willingness to comply with its statutory obligations, but rather from the more intense government enforcement that need not have been pursued at all had [defendant] exhibited these tendencies earlier" and adjusting the penalty *upward* for this factor); *see also Smithfield Foods*, 972 F. Supp. at 353 (stating that for the CWA section 309(d) justice factor, "courts may either *increase* or decrease the penalty in light of other matters, such as * * * a violator's attitude toward achieving compliance") (emphasis added).

Although the Presiding Officer did consider certain facts Phoenix presented as part of her analysis of the justice penalty adjustment factor, *see* discussion above sections V.D.2.e.i and e.ii, she apparently found that Phoenix's post-complaint compliance activities did not rise to a level that merited significant discussion. *See* Init. Dec. at 17 ("I find no other factors merit consideration under this criterion."). We agree with her overall determination, but have included a more detailed explanation below.

Upon considering the evidence Phoenix cites in support of its post-complaint compliance at the site and its efforts to improve its future compliance, we conclude that these activities do not meet the criteria we outlined in *Spang*, i.e., they are not the type of circumstances "that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." 6 E.A.D. at 250; *accord Catalina*, 8 E.A.D. at 216. To the contrary, we find that Phoenix's post-complaint compliance was a case of "too little, too late." The record demonstrates that Phoenix initially failed to install appropriate erosion control devices, failed to adequately repair them after DEP and the City recommended such measures, and even failed to adhere to the terms of the after-the-fact permit, which required such measures, *until* the State uncovered the inadequate measures during a follow-up inspection. *See supra* section IV.A. Only then did Phoenix finally erect adequate erosion control devices, albeit in a short time frame following the inspection. If anything, these actions warrant an increase in the penalty, not a decrease. *See supra* note 83; *see also Pepperell*, 9 E.A.D. at 119 (endorsing the presiding officer's decision not to reduce respondent's penalty where the actions respondent took to come into compliance occurred after the Agency discovered the violation, were directed at remedying future activities different from those that led to violations, and were not significant enough to meet the criteria articulated in *Spang*). Furthermore, insofar as Phoenix's measures to "prevent adverse environmental impact[s] on all subsequent jobs," *see* Tr. at 470-71, are solely promises with respect to future, as opposed to wholly or partially completed projects, we do not believe they are relevant here. *Spang*, 6 E.A.D. at 250 ("Under the justice factor in an administrative hearing promises of future acts are not relevant."). Thus, the only activities Phoenix cites that could potentially warrant any serious consideration for

penalty reduction are its measures to prevent adverse environmental impacts on projects that it had started and/or completed by the time of the administrative hearing. As these efforts neither seem to us to be all that significant, nor do they "constitute[] good deeds that exceed[] the requirements of the law," *Pepperell*, 9 E.A.D. at 114, we believe they are insufficient to justify a penalty reduction in this case. We, therefore, cannot say that the Presiding Officer clearly erred or abused her discretion in not discussing these facts in greater detail in her consideration of the justice factor in her penalty assessment. Phoenix's appeal on this ground accordingly fails.

f. *Overall Gravity Determination*

Phoenix argues that the Presiding Officer erred in finding the gravity of the violation to be significant. We have found she made no error nor abused her discretion with respect to any of the gravity factors discussed above. Accordingly, we find no error in her overall gravity determination assessing a base penalty of $20,000.

3. *"Degree of Culpability" Statutory Factor*

In the Initial Decision, the Presiding Officer increased the penalty by $3,000[84] based upon her evaluation of Phoenix's culpability.[85] Init. Dec. at 12-13. She predicated the culpability enhancement on several factors, including her determination that Phoenix and its principal officer, in their many years in the construction business dealing with the DEP and the Corps, had shown, "if not a complete disregard for regulatory controls, certainly a trivializing of the importance of such

[84] In its post-hearing brief, the Region requested a $5,000 enhancement based on culpability. Compl't Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief at 29.

[85] She explained that culpability is essentially an assessment of "how blameworthy" a respondent is, and that "knowledge of the legal requirements that were violated, willfulness or negligence with respect to the activity and disregard for regulatory controls are all relevant to determining penalty." Init. Dec. at 12; *see also infra* note 87 and accompanying text.

controls." *Id*. She also found that Phoenix, a company with its extensive construction project activity – "$45 million in projects in 2001, many of which were conducted near water" – had attempted to distance itself from the permitting process rather than taking the reasonable precaution of obtaining a copy of the requisite permits before filling wetlands. *Id*. at 12-13. Finally, she noted that Phoenix's and Mr. Finch's numerous encounters with various regulators regarding violations of environmental statutes "indicate knowledge of the environmental law that further exacerbate Respondent's culpability in this action." *Id*. at 13, 19.

Phoenix challenges the Presiding Officer's culpability determination on two fronts.[86] *See* Resp't Appeal Br. at 12-14. Phoenix first argues that, because the Presiding Officer found all of the incidents involving alleged prior CWA violations insufficient to establish the violator's prior history, she likewise should have considered this same evidence insufficient to establish culpability. *Id*. at 12-13. In its second approach, Phoenix argues that the Presiding Officer erred in considering certain evidence of alleged CWA violations "concerning Mr. Finch's bulkhead/seawall at his private residence." *Id*. at 13-14. Phoenix contends that because the CWA penalty provisions state that the Agency, in determining the amount of the penalty, "shall take into account * * * with respect to the violator * * * the degree of culpability," and because Phoenix Construction Services, and not James Finch, is the named "violator" in this case, only alleged violations with respect to Phoenix, and not those allegedly committed by Mr. Finch at his private residence, may be considered with respect to culpability. *Id*. at 13-14. Both of Phoenix's arguments are solely focused on the Presiding Officer's

[86] Phoenix appears to be under the misimpression that the Presiding Officer based her culpability enhancement solely upon the Phoenix's (and Mr. Finch's) past violations. *See* Resp't Appeal Br. at 12. This is not accurate. As we mention below, she also took into consideration the company's 19 years of experience in the construction business and its substantial activities in wetland areas of Florida. Furthermore, the Presiding Officer, at least in part, based her conclusion that Respondent (and its principal officer) demonstrated a trivial, if not complete, disregard for regulatory controls on Phoenix's statements and attitude, as exemplified by statements Mr. Finch made during his testimony. *See* Init. Dec. at 12.

consideration of "prior incidents" and not the other factors upon which she relied in enhancing the penalty for culpability. *See supra* note 86.

We find it unnecessary to address Phoenix's arguments regarding the Presiding Officer's consideration of prior incidents in her culpability assessment because, even setting aside these prior incidents, a penalty enhancement based upon Phoenix's culpability was warranted under the facts and circumstances of this case. The culpability statutory factor generally measures the level of the violator's fault or "blameworthiness"[87] and frequently includes a consideration of a host of factors to assess the violator's wilfulness and/or negligence. *See Penalty Framework* at 17-19. For example, the Agency's general penalty guidance lists several factors that may be used in assessing culpability: (1) how much control the violator had over the events constituting the violation; (2) the foreseeability of the events constituting the violation; (3) whether the violator took reasonable precautions against the events constituting the violation; (4) whether the violator knew or should have known of the hazards associated with the conduct; (5) the level of sophistication within the industry in dealing with compliance issues; and (6) whether the violator in fact knew of the legal requirement which was violated. *Penalty Framework* at 18. Along similar lines, the Agency's section 404 settlement guidance states that the two principal criteria for measuring culpability are "the violator's previous experience with the Section 404 permitting requirements and the degree of the violator's control over the illegal conduct." *404 Settlement Policy* at 3. Other factors that the Board has considered in the context of culpability include the attitude of the violator, *see In re Pacific Refining Co.*, 5 E.A.D. 607, 616 n.12 (EAB 1994), the cooperativeness of respondent, *see In re Pepperell Associates.*, 9 E.A.D. 83, 115 (EAB 2000), and the good faith

[87] "Culpability" is defined as "the quality or state of being culpable; blameworthiness." Webster's Third New International Dictionary 552 (1993); *accord In re Indus. Chems. Corp*., Dkt. No. CWA 02-99-3402 (ALJ, June 16, 2000). As the Agency has explained in its general penalty guidance, "[k]nowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty." *Penalty Framework* at 18.

and diligence in reporting violations and fixing problems, *In re City of Marshall*, CWA Appeal No. 00-9, slip op. at 23 n.33 (EAB, Oct. 31, 2001), 10 E.A.D. __; *In re Industrial Chemicals Corp.*, CWA Appeal No. 00-7, slip op. at 27 n.20 (EAB, Jan. 15, 2002), 10 E.A.D. __.

In this case, a close scrutiny of Phoenix's actions in light of most of the above-mentioned factors would lead to an enhancement for culpability. First of all, it is clear that Phoenix had complete control over the illegal conduct. Phoenix performed the filling activities and did so, according to the Presiding Officer based upon the evidence presented at the hearing as well as her assessment of the credibility of the witnesses, with the knowledge that a permit had not yet been issued. Init. Dec. at 12-13, 16 & n.5; *see also* discussion *supra* section V.D.2.e.iii. Furthermore, Phoenix's extensive construction activities over the past two decades in and around aquatic areas, including wetland areas, makes it difficult to believe Phoenix was unaware of the legal requirements governing its activities. *See* Init. Dec. at 12-13; *see also Britton* , 8 E.A.D. at 280 (noting the potential to increase the culpability with respect to the respondent who had been "a long-time resident of Chincoteague engaged in the construction business"). In fact, in this particular instance, Phoenix *was* fully aware of the need to obtain a permit, as the City's attempts to obtain the necessary permits had been a topic of conversation at the regular meetings between Phoenix and the City. Tr. at 186-87, 258, 471. Moreover, we agree with the Presiding Officer that reasonable precautions, in the form of obtaining a copy of the permit, had Phoenix taken them, would have completely prevented this violation. *See Pepperell,* 9 E.A.D. at 111 (holding that the presiding officer's finding of high culpability was proper based upon, among other things, respondent's "remarkable lack of concern regarding the possible application of the regulations" to its activities). Together, these facts suggest a level of, if not willfulness, substantial negligence on Phoenix's part.

Additionally, as noted by the Presiding Officer, Phoenix's attitude (as exemplified by its president's testimony) shows little respect for regulatory controls. *See, e.g.,* Tr. at 254-60; *see also* Init. Dec. at

12.[88] Finally, with respect to Phoenix's "diligence in fixing the problem," as we stated above in section V.D.2.e.vi, Phoenix's continued failure to adequately repair the erosion control devices for months following its failure to install them properly in the first place, warrants an increase in the penalty. These facts, taken together, support a $3,000 increase in the penalty for culpability, even without a finding that Phoenix had received any notices of violation. Because we so hold, we find it unnecessary to address Phoenix's arguments with respect to the Presiding Officer's consideration of prior incidents in her culpability analysis.

4. *Comparison to Penalties in Other Cases*

Lastly, Phoenix compares its penalty with those assessed in other CWA cases and claims that the penalty assessed against it should be in line with those other penalties. Resp't Appeal Br. at 15-16, 18. This argument merits only a brief response as we have addressed it before on numerous occasions.[89] As we stated in *In re Newell Recycling Co.*, "[w]e continue to hold to the principle that penalty assessments are sufficiently

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[88] For example, subsequent to Mr. Finch's testimony about his company's extensive involvement in projects near water, the following dialogue took place regarding his knowledge about the permits required for the Frank Brown Park project:

Q: But you were aware that you needed a permit in this case?

A: "Yeah, I think it's state law."

Q: "What about a federal permit?"

A: "Whatever, it's all federal, local guidelines you got to abide by."

Tr. at 254. As an example of the negative attitude of Phoenix and its principal officer towards regulatory controls, the Presiding Officer cited Mr. Finch's response to a question about a possible permit violation, in which he stated that "I paid them five or six hundred dollars to get them to go away and leave me alone." Init. Dec. at 12 (citing Tr. at 272-73).

[89] We note that the Presiding Officer's penalty was well within the statutory maximum, as mentioned above in section V.D.2.d.

fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another."[90] 8 E.A.D. 598, 642 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001); *accord In re Titan Wheel Corp.*, RCRA (3008) Appeal No. 01-03, slip op. at 8-11 (EAB, June 6, 2002), 10 E.A.D. __, *aff'd*, No. 4:02-CV-40352 (S.D. Iowa, Nov. 10, 2003); *In re Advanced Elecs., Inc.*, CWA Appeal No. 00-05, slip op. at 40 (EAB Mar. 11, 2002), 10 E.A.D. __, *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003); *see also In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 493-94 (EAB 1999); *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) ("'Generally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings.'" (quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985))). This principle is especially true under

[90] Along similar lines, the Supreme Court has stated that "[t]he employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187; *accord Newell Recycling Co. v. U.S. EPA*, 231 F.3d 204, 210 n.5 (5th Cir. 2000) (holding that the penalty assessed by EPA in that case "need not resemble those assessed in similar cases"), *cert. denied*, 534 U.S. 813 (2001). Additionally, at least one federal district court has specifically held that comparisons between CWA cases are not appropriate. *United States v. Allegheny Ludlum Corp.*, 187 F. Supp.2d 426, (W.D. Pa. 2002) ("Given the six statutory factors to consider and the variations they represent, penalties under the Act can be analyzed in no other way than case-by-case."); *cf. United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999) (noting that "even if the [trial] court had simply trebled the economic benefit to determine the appropriate penalty, that was within its discretion, as long as it was below the statutory maximum"), *cert. denied*, 531 U.S. 813 (2000); *Weiszmann v. Dist. Eng'r, U.S. Army Corps of Eng'rs*, 526 F.2d 1302, 1306 (5th Cir. 1976) ("We cannot be called upon to second guess the question of the amount of the civil penalty imposed within the limitations of the Act.").

the CWA where "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties." *Tull v. United States*, 481 U.S. 412, 427 (1987). Accordingly, we uphold the Presiding Officer's implicit decision[91] not to base or adjust the penalty in this case based upon penalties assessed in other CWA cases.

E. *Region's Appeal: Economic Benefit*

In its cross-appeal, the Region contends that the Presiding Officer erred in failing to increase the penalty to reflect the alleged economic benefit received by Phoenix. Reg. Cross-Appeal Br. at 1. In its post-hearing brief and its cross-appeal brief, the Region has argued that "Respondent benefitted economically from filling the wetlands in advance of permit issuance at a time when otherwise idle equipment was available on the Site. * * * Each day that equipment was operating at the Site instead of sitting idle while awaiting permit issuance resulted in a savings to Respondent of the hourly costs of keeping the equipment at the Site." *Id*. at 32; Compl't Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief at 12-15. The Region calculated the economic benefit by multiplying the cost per hour for the equipment to remain idle at the site, as estimated by Mr. Finch, *see* Reg. Cross-Appeal Br. at 33-34 (citing Tr. at 297-98), by a conservative number of hours per day that such equipment could have been used (7 hours), by the number of days that the equipment was actually found to have been used to fill the wetland (5 days), for a total of $5,775. *Id*. at 32-34. In her Initial Decision, the Presiding Officer held that the Region had failed to sufficiently prove that Phoenix accrued any economic benefit and therefore declined to assess any penalty amount based upon this statutory penalty factor. Init. Dec. at 19.

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[91] Phoenix, in its Post-Hearing Brief, described penalties imposed in other CWA cases and requested that the Presiding Officer assess a fine similar to that imposed in *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989), a $10 fine per violation. *See* Resp't Proposed Findings of Fact and Conclusions of Law at 12. Although the Presiding Officer did not explicitly address the question of whether it was appropriate to compare the penalty in this case to those in other CWA cases, she did not rely on any specific penalty amounts assessed in other cases as a basis for assessing a penalty in this case.

Not only does the Region assert that it sufficiently demonstrated at the hearing that Phoenix saved $5,775 by using equipment that would otherwise have lain idle and been accruing maintenance charges, Reg. Cross-Appeal Br. at 31-35, but it also alleges that the Presiding Officer's reliance on the fact that the equipment could have been moved and/or that Phoenix could have charged the City for the equipment maintenance costs was erroneous, *id*. at 34-35. Lastly, the Region argues that one of the Presiding Officer's reasons for not increasing the penalty based on economic benefit – that the "gravity-based penalties are already substantially in excess of the economic benefit" – was erroneous as a matter of law. *Id*. at 35 (quoting Init. Dec. at 15).

F. *Analysis of the Region's Arguments*

As we have emphasized in previous cases, the recovery of any economic benefit that has accrued to a violator as a result of its noncompliance with environmental requirements is a critical component of the Agency's civil penalty program. *In re B.J. Carney Indus., Inc.,* 7 E.A.D. 171, 207 (EAB 1997), *appeal dismissed as moot,* 200 F.3d 1222 (9th Cir. 2000); *see also In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant*, CAA Appeal No. 02-04, slip op. at 51-52 (EAB, June 5, 2003), 10 E.A.D. __ (noting the importance of recovering economic benefit); *In re Wallin*, CWA Appeal No. 00-03, slip op. at 13 (EAB, May 30, 2001), 10 E.A.D. __ ("We do not * * * question the paramount importance Agency penalty policy and previous Board decisions place upon extracting the economic benefits violators reap through their noncompliance."); *see generally Policy on Civil Penalties* at 3 ("[I]t is Agency policy that penalties generally should, *at a minimum*, remove any significant economic benefits resulting from failing to comply with the law."). This is especially true in enforcement matters brought under environmental statutes, such as the CWA, where the statutory criteria require a consideration of the "economic benefit or savings (if any) resulting from the violation." CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). Several federal district and circuit courts have likewise stressed the importance of recovering a CWA violator's economic benefit of noncompliance. *E.g.*, *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990); *United States v. Allegheny Ludlum*

Corp., 187 F. Supp. 2d 426, 444 (W.D. Pa. 2002); *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 862-63 (S.D. Miss. 1998).

In the environmental enforcement context, economic benefit is typically calculated as a measure of "delayed costs," "avoided costs," and/or the "benefit from competitive advantage gained through noncompliance." *Britton*, 8 E.A.D. at 287. Because of the nature of wetlands violations, these three analytical measures often prove challenging in section 404 cases. As we have explained, "in the context of section 404 violations, where property use rather than pollution control equipment is the central focus, EPA has stated that the economic benefit calculation may include '[t]he increased property value directly resulting from an unlawful discharge of dredge or fill material.'" *Id*. (quoting *404 Settlement Policy* at 4). In the current matter, however, such a calculation would be unworkable, as Phoenix was the contractor for the landowner and not the landowner itself, and, therefore, any increased value of the land would not accrue to it. Apparently recognizing this fact, the Region here used a novel approach to estimate economic benefit, arguing that Phoenix saved $5,775 by using equipment that would otherwise have lain idle and been accumulating maintenance charges. *See* discussion of calculations above.

In her Initial Decision, the Presiding Officer essentially concluded that the Region had not met its burden of proof on this issue. She described the economic benefit evidence as "not sufficiently established," and based on some "fallacious" assumptions. Init. Dec. at 14-15, 19. She stated that while "it is conceivable that [Respondent] was faced with escalating costs of equipment sitting idly on site," Phoenix's witnesses testified that "any additional costs it would have incurred would have been recovered from the City" because it had failed to have obtained the proper permits prior to contracting with Phoenix. *Id*. at 15 (citing Tr. at 490); *see also* Tr. at 513. The Presiding Officer also pointed out that the Region's theory was based on the fact that "Respondent would have left its equipment sitting idly on site rather than remove it pending permit issuance." Init. Dec. at 14. Certain testimony, however, indicated that the equipment could have been sent offsite and

returned when needed.[92] *See* Tr. at 490, 513. Consequently, the Presiding Officer found that the evidence with respect to economic benefit was too speculative, and concluded that the Region had failed to convincingly establish that Phoenix had reaped any economic benefit. Init. Dec. at 15, 19. Thus, she did not add any additional penalty to the gravity component assessment.

Notwithstanding the importance of including an economic benefit of noncompliance component to the penalty assessment, we cannot find that the Presiding Officer clearly erred or abused her discretion on this issue. While it is true, as the Region argues, *see* Reg. Cross-Appeal Br. at 33 (citing cases), that an exact calculation of a respondent's benefits is not necessary in order to establish economic benefit, this is not a case where the problem is the approximate nature of the Region's economic benefit calculation. Instead, here the issue is whether the Region proved by a preponderance of the evidence that Phoenix gained any economic benefit from filling the wetlands prematurely. Although the Region did adduce some evidence that Phoenix may have been accruing costs each day while being forced to wait for the permit because the equipment was lying idle, on the other hand, there was evidence that: (1) Phoenix had the right to bill the City for reimbursement for these costs and (2) Phoenix, if it felt the delay had been too long or that it was accruing unacceptable costs, could have sent the equipment to another site. Because all the evidence on this issue was in the form of testimony, the Presiding Officer's findings were based, in part, on her determination of the credibility of the various witnesses and their statements. After reviewing the record, and in light of our deference to the Presiding Officer on questions related to the credibility of witnesses, we find that the Presiding Officer did not commit clear error nor abuse her discretion in failing to include an economic benefit component in the penalty assessment.

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[92] The Region argued that sending the equipment offsite and retrieving it later would also involve some costs. Reg. Cross-Appeal Br. at 34. The Region, however, did not provide sufficient information with which these alleged costs could be calculated. *See id.* at 34-35.

Finally, as noted, the Region also argues that the Presiding Officer erred in stating that because "the gravity based penalties are already substantially in excess of the economic benefit, no assessment on this basis is warranted." Reg. Cross-Appeal Br. at 35 (citing Init. Dec. at 15). We agree that the Presiding Officer's statement neither reflects a correct orientation under the statutory penalty criteria not correctly interprets applicable law. Where a complainant successfully proves both an economic benefit to the respondent and that the gravity of the respondent's violation warrants a penalty, the presiding officer may, and, in most circumstances, should, add these two penalty amounts together with any other penalty factor components to derive the final penalty amount. *See Policy on Civil Penalties* at 3 (indicating that to ensure a penalty will deter violations, the penalty should include a component to recapture any benefits of noncompliance *as well as* an additional amount based on the seriousness or gravity of the violation); *see also Penalty Framework* at 2 (same). However, although the Presiding Officer erred in making the above-cited statement, because we find that the Presiding Officer did not clearly err or abuse her discretion in holding the evidence insufficient to establish any economic benefit, this error does not affect the ultimate result on the issue of economic benefit in this case.

VI. *CONCLUSION*

For the foregoing reasons, we conclude that the Presiding Officer did not err or abuse her discretion in assessing a $23,000 penalty against Phoenix for violations of the CWA. Accordingly, the penalty is affirmed. Payment of the $23,000 penalty shall be made within sixty (60) days of this final order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

Regional Hearing Clerk
United States EPA, Region IV
Post Office Box 100142
Atlanta, GA 30384

So ordered.